Supreme Court, U.S.
FILED

(1)

NO. 98 480 SEP 17 1998

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

COMM-CARE CORPORATION
Petitioner,

v.

LOUISIANA TAX COMMISSION, et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF LOUISIANA

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Due process requires the states to provide a clear and certain remedy for aggrieved taxpayers to contest tax assessments. This may be provided in the form of pre-deprivation relief or post-deprivation relief or both. When a state provides both remedies by statutes clear and certain on their faces, may the courts of the state, by reading additional requirements into the statutes, deny relief to taxpayers who comply with the statutes' facial requirements, or is this another variation on the "bait and switch" scheme proscribed in *Reich v. Collins*, 115 S.Ct. 547 (1994).

## FEDERAL QUESTION AS PRESENTED AND CONSIDERED IN STATE COURTS

1. In the state court of appeal, petitioner urged in brief that the state district court's summary dismissal for petitioner's failure to pay the subject taxes timely was a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution: See appendix 9, pp. 7, 11-13. The state court of appeal ignored petitioner's due process claim entirely. See appendix 3.

2. Petitioner again urged its due process claim in its application to the state supreme court for certiorari. See appendix 10, pp. 1, 4, 8-10. The state supreme court denied petitioner's application without reasons. See appendix 4.

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the Louisiana Supreme Court are the LOUISIANA TAX COMMISSIION; LEE J. THEVENOT, in his capacity as Assessor for the PARISH OF AVOYELLES, JEWETTE FARLEY, in her capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER in his capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR. in his capacity as Assessor for the PARISH OF ASCENSION; EUGENE CAVANAUGH, in his capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES PARISH; CARMON WALKER, in his capacity as Assessor for the PARISH OF CATAHOULA; RICH BAILEY, in his capacity as Assessor for the PARISH OF QUACHITA; JOE TORN TRUNZLER, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF CATAHOULA; WILLIE WAYNE HOUCK, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF LINCOLN; WILLIAM EARL HILTON, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF RAPIDES; FRANK A. HOWARD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF VERNON; HAROLD L. TRIDICO, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF ASCENSION; WILLIAM BELT, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF AVOYELLES; M. BOLIVAR BISHOP, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF BEAUREGARD; ELMER LITCHFIELD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF EAST BATON ROUGE; LAYMON GODWIN, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF OUACHITA.

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## OPINIONS BELOW

The opinions of the state tax commission, the 19th Judicial District Court for East Baton Rouge Parish, Louisiana, the First Circuit Court of Appeal of the State of Louisiana, and the Supreme Court of the State of Louisiana are all unreported. They are reprinted in full at appendices 1, 2, 3 and 4, respectively.

## BASIS FOR JURISDICTION

The judgment of the Supreme Court for the State of Louisiana was entered on June 19, 1998. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1257.

## CONSTITUTIONAL PROVISIONS

Section 1 of Article XIV of the Constitution of the United States of America provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

On April 15, 1993, the Internal Revenue Service determined that petitioner Comm-Care Corporation ("Comm-Care") is organized and operated exclusively for charitable purposes as defined in §501(c)(3) of the Internal Revenue Code of 1986,[1] and that Comm-Care's proposed acquisition and operation of ten nursing homes (the "Facilities") in Louisiana were consistent with its charitable, exempt purposes. On March 1, 1994, in keeping with the Service's ruling letter, Comm-Care bought the Facilities located in nine different parishes in Louisiana. This petition relates only to the state courts' action with respect to Comm-Care's 1995 taxes but the procedural history began in 1994 when Comm-Care acquired the Facilities.

In April, 1994, pursuant to Article VII, §21B(1)(a) of the Louisiana Constitution of 1974,[2] Comm-Care notified the tax assessors of its acquistion of the Facilities and its exempt status and requested that the Facilities be placed on the exempt rolls for 1994 ad valorem tax purposes. The assessors refused and assessed the Facilities for 1994 taxes. Comm-Care paid the taxes under protest in January, 1995 and filed suits for refund within thirty days, strictly as prescribed by Louisiana's tax-refund statute.[3]

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[1] 26 U.S.C. §501(c)(3).

[2] "(There) shall be exempt from ad valorem taxation; property owned by a non-profit corporation or association organized and operated exclusively for...charitable, health, welfare...purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax..."

[3] R.S. 47:2110, printed in full at appendix 5, is Louisiana's "post-deprivation" remedy. See *Comm-Care Corporation v. Louisiana Tax Com-*

All of the suits[4] were summarily dismissed on grounds that Comm-Care had no cause of action under the refund statute because the taxes had not been paid timely, *i.e.* on or before the last day of the tax year. Although the refund statute makes no requirement for timely payment, the courts read this requirement into the statute by reading it in *pari materia* with other sections[5] which state that if the taxes are not paid by the end of the year, interest and penalty begin to accrue and the assessed property becomes subject to seizure and sale. One state court of appeal affirmed[6] and the other reversed.[7] On *certiorari*, the state supreme court affirmed the decision of the state court of appeal adverse to Comm-Care and reversed the decision of the other state court of appeal.[8] On rehearing, the state supreme court side-stepped Comm-Care's due process claim and disposed of the consolidated cases on an alternate ground: that the taxable status of property for each tax year must be determined by "the condition of things" on January 1, *ergo*, since

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footnote 3 continued

*mission*, 696 So.2d 969 (La. 1997); *cf. Reich v. Collins, supra.*

[4] Suits were filed in all nine parishes. Eight tax collectors agreed to a transfer and consolidation; one did not.

[5] See R.S. 47:2101, printed in full at appendix 6.

[6] *Comm-Care Corporation v. Louisiana Tax Commission*, 681 So.2d 1001 (La. App. 1st Cir. 1996), following its decision in *Capital Drilling Co. v. Graves*, 496 So.2d 487 (La. App. 1st Cir. 1986).

[7] *Comm-Care Corporation v. M. Bolivar Bishop*, 673 So.2d 212 (La. App. 3rd Cir. 1996).

[8] *Comm-Care Corporation v. Louisiana Tax Commission*, 696 So.2d 969 (La. 1997).

Comm-Care did not own the Facilities on January 1, 1994 it had no basis to claim exemption for that year.[9]

While the 1994 case was pending, Comm-Care was asserting its claim of exemption from 1995 taxes in this case pursuant to Louisiana's "pre-deprivation" process[10] by administrative appeals to the assessors, local boards of review and state tax commission. On February 13, 1996, following a hearing and the introduction of uncontroverted evidence, the tax commission found that "Comm-Care Corporation is a non-profit corporation operated for health and welfare purposes, exempt from federal and state income taxation as required in the 1974 Constitution, Article VII, Section 21B(1)(a)." However, the tax commission, despite its finding that Comm-Care satisfied the constitutional requirements, ruled that the Facilities were somehow not exempt from ad valorem taxation: "The Commission further finds that after reviewing all the evidence presented by the parties in the proceeding, that Comm-Care was not operating the nursing homes in a 'charitable' manner. The Commission further finds that the nursing homes appear to be operated in the same manner as any "for-profit" organization would operate."

Comm-Care paid the 1995 taxes under protest on February 13, 1996, the same day the tax commission rendered its decision. On February 27, 1996, within thirty days of the tax commission's decision, Comm-Care filed a petition for

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[9] *Comm-Care Corporation v. Louisiana Tax Commission*, 706 So.2d 425 (Sup.Ct. 1998).

10 R.S. 47:1992, printed in full at Appendix 7.

review with the state district court.[11] The state district court summarily dismissed the suit on grounds that Comm-Care had failed to pay the contested taxes when due on December 31, 1995,[12] the state court of appeal affirmed,[13] and the state supreme court denied Comm-Care's application for certiorari.[14] In net effect, the state supreme court has let stand conflicting decisions between two state courts of appeal in the 1994 case as to taxpayers' post-deprivation access to the courts and, in this case, the decision of the state court of appeal denying Comm-Care its statutorily prescribed pre-deprivation remedy, which is in direct conflict in this case with a previous decision of another state court of appeal in *Rickey Tri-Key Partnership v. Dupleix*, 462 So. 2d 235, (La. App. 3d Cir. 1984), *writ denied* 464 So.2d 1385 (La. 1985). Louisiana taxpayers in the first judicial circuit must pay timely to avail themselves of either remedy, while those in the third judicial circuit need not. The rule in the second, fourth and fifth judicial circuits is anyone's guess.

## REASONS FOR GRANTING THE WRIT

Imposition of a tax is a taking of property. Under the Fifth and Fourteenth Amendments to the United States Constitution, the power to tax is legally exerted only if, at some stage, the taxpayer is given an opportunity to contest illegal

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[11] Pursuant to R.S. 47:1998, printed in full at appendix 8. Comm-Care also satisfied the requirement of R.S. 47:2110E by paying the taxes under protest and filing suit within thirty days.

[12] See Reasons for Judgment printed in full at appendix 2.

[13] *Comm-Care Corporation v. Louisiana Tax Commission*, (unpublished opinion), printed in full at appendix 3.

[14] Appendix 4.

exactions in keeping with due process principles. *Central of Georgia R. Co. v. Wright*, 207 U.S. 127 (1907; *Mitchell v. M.T. Grant Company*, 416 U.S. 600 (1974).

Due process under the Fifth and Fourteenth Amendments requires the states to provide a clear and certain remedy for aggrieved taxpayers to contest tax assessments.[15] Otherwise, an unlawful tax exaction constitutes a deprivation of property without due process of law. A state may provide the requisite procedural safeguards either by pre-deprivation relief, post-deprivation relief or both.[16]

The due process issue presented in this case is whether R.S. 47:1998, as interpreted and applied by the state court of appeal, constitutes clear and certain pre-deprivation relief.

In *Carpenter v. Shaw*, 280 U.S. 363 (1930), the Choctaw Indian Tribe avoided a distress sale by paying property taxes under protest. The Supreme Court of Oklahoma denied the tribe's right to recover based on a provision of the state statute which allowed a refund suit only if the tax was paid timely. This Court reversed, holding that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter* at 369.

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[15] *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, (1990); *Iowa-Des Moines National Bank v. Bennet*, 284 U.S. 239 (1931); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Ward v. Board of County Commissioners of Love County*, 253 U.S. 17 (1920); *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912).

[16] *Reich v. Collins, supra.*

This case involves a claim of exemption under the state's constitution, not a federal law. Nevertheless the holding in *Carpenter* applies. "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of the law."[17]

While the states are free to determine whether to provide a pre-deprivation remedy, a post-deprivation remedy, or both, the remedy or remedies it does provide must give taxpayers clear and certain relief.[18] Louisiana provides both remedies: the pre-deprivation administrative proceeding outlined in R.S. 47:1989-1998 and the post-deprivation proceeding described in R.S. 47:2110.

Thwarted in its efforts to have its day in court pursuant to the state's post-deprivation remedy the previous year, Comm-Care chose to contest the 1995 assessments pursuant to what on its face is a clear and certain pre-deprivation remedy as provided by R.S. 47:1989-1998. Comm-Care complied with each and every requirement set forth in those sections, only to be told by the state court of appeal that it had failed to comply with another requirement, which may be found only by reading the statute in *pari materia* with others.[19] This is a clear denial of due process.

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[17] *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930).

[18] *Reich v. Collins, supra.*

[19] *Comm-Care had a right to rely on R.S. 47:1989-1998 as written. La. Civil Code Art. 1; Johnson v. St. Paul Mercury Ins. Co.*, 236 So.2d 216 (Sup. Ct. 1970); Tate, *Louisiana and the Civil Law*, 39 La.L.Rev. 727, 743 (1962).

In *Reich v. Collins,*[20] this Court examined the Georgia supreme court's application of Georgia's post-deprivation remedy, which provides that "a taxpayer shall be refunded any and all taxes ... which are determined to have been erroneously or illegally assessed ... whether paid voluntarily or involuntarily." On *Reich's* first appeal, the Georgia supreme court construed the refund statute not to apply to "the situation where the law under which the taxes (were) assessed and collected is itself subsequently declared to be unconstitutional." On *Reich's* second appeal, the Georgia supreme court reasoned that states may choose to provide pre-deprivation or post-deprivation relief and that Georgia provided a satisfactory pre-deprivation remedy which *Reich* had failed to follow, therefore it was not a denial of due process to deny *Reich* relief under the state's post-deprivation statute. This court agreed that the states may provide one remedy or the other or both "so long as that scheme is clear and certain ...(and the state may) reconfigure its remedial scheme over time, to fit its changing needs . . . *but what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course to bait and switch, as some have described it.*"[21]

This bait-and-switch scheme is the end result of the Louisiana courts' strained interpretation of the statute. The sequence of sections culminating in R.S. 47:1998 is designed by the legislature to provide for pre-deprivation relief. The state courts' interpretation of the statute adds an unwritten requirment and produces the same bait-and-switch result proscribed in *Reich.*

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[20] *Supra.*

[21] *Reich v. Collins, supra (emphasis added).*

## CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue herein to review the judgments and opinions of the courts of Louisiana.

Respectfully submitted,

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## APPENDIX

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# APPENDIX 1

## LOUISIANA TAX COMMISSION
## STATE OF LOUISIANA

| | | |
|---|---|---|
| IN RE: | : | LTC DOCKET NO.: 95-009, |
| | : | 95-010, 95-011, 95-012 A-B, |
| | : | 95-013, 95-014, 95-015, 95-028 |
| COMM-CARE CORP. | : | A-B, 95-029 |

## FINDINGS OF FACT AND REASONS FOR DECISION

This matter came to be heard on the 7th day of December, 1995 and was continued on the 18th day of December, 1995, at Baton Rouge, Louisiana. This hearing was at the request of Comm-Care Corporation, for determining its request for exemption of ad valorem taxes. Paul West and John Stassi, attorneys, represented Comm-Care Corporation. Also present, were Carmon Walker, Catahoula Parish Assessor Bobby Cudd, Beauregard Parish Chief-Deputy Assessor; and Eugene Cavanaugh, Vernon Parish Assessor.

The properties being appealed are ten(10) extended-care facilities, namely: D'Ville House in Ascension Parish, Oak Haven and Bayou Vista in Avoyelles Parish, Beauregard Nursing Home in Beauregard Parish, Columns in Catahoula Parish, Baker Manor in East Baton Rouge Parish, Towne Oaks in Lincoln Parish, Ridgecrest in Ouachita Parish, Tioga Manor in Rapides Parish and Kurthwood Manor in Vernon Parish. Comm-Care acquired the ten (10) extended-care facilities on March 1, 1994.

Exhibits were offered into evidence by the Assessor and the taxpayer.

The taxpayer is asking for the properties to be declared exempt; and notes, "If the exemption is denied, taxpayer does not contest the assessors' 1995 valuations."

Comm-Care Corporation contends that they are a non-profit corporation operated for health and welfare purposes, exempt from federal and state income taxation as required in the 1974 Constitution Article 7, Section 21(B)(1)(a).

Article 7 § 21(B)(1)(a) states:

> Property owned by a nonprofit corporation or association organized and operated exclusively for religious, dedicated places or burial, charitable, health, welfare, fraternal, or educational purposes, no part of the net earnings of which insure to the benefit of any private shareholder or member thereof and which is declared to exempt from federal or state income tax;



The taxpayer argues that the ten (10) extended-care facilities should be placed on the exempt rolls effective March 1, 1994. They further argue that under the 1974 Constitution the court in *Hotel Dieu* determined that "the presence of 'health purposes' " would grant the exemption to a non-profit corporation whose sole function is to operate a nursing home. They further argue that under the 1974 Constitution, health care is a charitable purpose, thus their nursing facilities should be exempt from ad valorem tax and must be placed on the exempt rolls as of the date of purchase.

The assessors argue that the nursing homes were operated in the same manner as any "for-profit" organization would operate. They further argue that there was very little charitable activity by Comm-Care Corporation. They strongly feel that these nursing homes should not be tax exempt because of the above stated reasons.

The Commission finds that Comm-Care Corporation is a non-profit corporation operated for health and welfare purposes, exempt from federal and state income taxation as required in the 1974 Constitution Article VII, Section 21(B)(1)(a). The Commission further finds that after reviewing all the evidence presented by the parties in the proceeding, that Comm-Care was not operating the nursing homes in a "charitable" manner. The Commission further finds that the nursing homes appear to be operated in the same manner as any "for-profit" organization would operate.

Applying its experience, technical competence and specialized knowledge, and based upon the evidence and testimony in records, the Louisiana Tax Commission 1qAzfinds that the property is not exempt from ad valorem taxation.

Thus done and signed at Baton Rouge, Louisiana this *13th* day of *February,* 1996.

/s/ Malcolm B. Price, Jr.
Malcolm B. Price, Jr., Chairman

/s/ Valery A. Lowery
Valery A. Lowery, Member

/s/ Kenneth P. Naquia, Jr.

Kenneth P. Naquia, Jr., Member

A TRUE COPY OF A DOCUMENT IN
OUR FILES THIS *13th*
DAY OF *February,* 1996

/s/ Ann R. Laurence

EXECUTIVE SECRETARY

## APPENDIX 2

| | | |
|---|---|---|
| COMM-CARE CORPORATION | * | NO. 425,365 - DIVISION M |
| | * | 19TH JUDICIAL DISTRICT COURT |
| VERSUS, | | |
| | * | PARISH OF EAST BATON ROUGE |
| LOUISIANA TAX COMMISSION | * | STATE OF LOUISIANA |

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

### WRITTEN REASONS FOR JUDGMENT

This matter is before the Court on Exceptions of No. Cause of Action and Prescription filed by the assessor defendants.

Plaintiff, Comm-Care Corporation, brings this petition for judicial review of a decision of the Louisiana Tax Commission rendered February 13, 1996. As the petition states, this request for judicial review is made pursuant to La. R.S. 47:1998
A. (1).

With respect to the exception of no cause of action, the defendants contend the petition fails to state that the 1995 taxes have been paid at all, much less by the December 31,

1995 deadline set forth in La. R.S. 47:2101 for payment of ad valorem taxes. The parties have agreed in arguments before the Court that the taxes at issue (1995 ad valorem taxes) were paid under protest on February 13, 1996. That stipulation is relevant and admissible with respect to the prescription exception but not on the exception of no cause of action on which no evidence is admissible.

**PRESCRIPTION**

The petition alleges that petitioner followed the administrative procedures set out in La. R.S. 47:1992 by for complaint to the local board of review challenging the assessments, then appeal to the Louisiana Tax Commission. La. R.S. 47:1998 permits suits by taxpayers "dissatisfied with the action of the tax commission under the provisions of R.S. 47:1989," which suit must be instituted "within thirty days of the decision of the tax commission," which plaintiff has here done. The tax commission decision is dated February 13, 1996. The lawsuit was filed on February 27, 1996, within the thirty days. (See La. R.S. 47:1998 A(1))

The statute further provides, however, that "Any taxpayer who has filed suit under this provision and whose taxes have become due shall pay such taxes under protest . . . ." (See La. R.S. 47:1998 A (2))

The question then becomes whether or not this taxpayer's failure to pay its taxes on or before the due date of December 31, 1995, operates as a bar to its suit for judicial review of the tax commission decision. Exceptors contend that the right to pay under protest has prescribed where the payment of the taxes was not made by December 31 of the

tax year. *Capital Drilling Co. v. Graves*, 496 So. 2d 487 (La. App. 1 Cir. 1986).

Plaintiff correctly asserts that the cases relied on by the exceptors involve taxpayer challenges to ad valorem taxes filed under La. R.S. 47:2110, the procedure for a nonadministrative challenge to an ad valorem tax. See, for instance, *Comm-Care Corporation v. Louisiana Tax Commission, et al.*, Docket No. 96/CA/0039, La. First Circuit Court of Appeal, September 27, 1996; and *Capital Drilling Company v. Graves, supra.* A case cited by the plaintiff - - *Comm-Care Corporation v. M. Bolivar Bishop*, 673 So. 2d 212 (La. App. 3rd Cir 1996), rehearing denied 5/30/96, writ application pending - - likewise deals with a proceeding filed under La. R.S. 47:2110. [This Court notes, however, that the First Circuit has recently declined to follow the rationale of that particular Third Circuit decision. See *Comm-Care v. La. Tax Commission, supra*, at p. 10.]

The Court is aware that this particular proceeding is not brought under La. R.S. 47:2110 (as are the cited cases) but comes before this Court under the authority of a different statute, La.R.S. 47:1998 A. (1).

The Court finds only one case involving prescription under La. R.S. 47:1989 D involving appeals from a Tax Commission decision. *Rickey Tri-Key Partnership v. Dupleix*, 462 So. 2d 235 (La. App. 3rd Cir. 1984), writ denied (1985). In *Rickey*, the taxpayer paid its 1982 taxes under protest on January 27, 1983 and the Tax Commission decision adverse to the taxpayer was rendered on April 22, 1983. Suit was thereafter filed for review of that decision within 30 days thereafter on May 23, 1983. The Third Circuit held that

La. "R.S. 47:1998 A expressly gives appelant the right to contest an adverse decision of the Tax Commission in district court within thirty days of that decision." *Rickey*, p. 236. The Third Circuit apparently felt that the timely filing of suit was all that was required to preserve the taxpayer's right to seek judicial review despite the fact that the taxes where paid on January 22, 1993, after the due date of December 31, 1982 of the tax year. Writs were denied by the Louisiana Supreme Court. The Court notes, however, that the late payment of the taxes was not made issue in that case.

Exceptors cite First Circuit decisions determining prescription under La. R.S. 47:2110, which do make references (dicta only) to proceedings brought under La. R.S. 47:1998. See *Comm-Care Corporation v. La. Tax Commission, supra.*, p. 8-9 of slip opinion, citing *Capital Drilling Co. v. Graves, supra.*, for the proposition that "La. R.S. 47:1998(A) requires timely payment by a taxpayer choosing to challenge the correctness of an assessment." See, particularly, *Capital Drilling Co., at p. 492:*

> *Thus, if the taxpayer had chosen to correct the correctness of the assessment pursuant to the procedure required by La. Const. of 1974, Art. VII,* §18E, it nevertheless would have been required to timely pay the taxes under protest. La. R.S. 47:1998(A).

Exceptors contend that the payment of the tax after the due date defeats the taxpayer's right to a review of the Tax Commission decision, analogizing the situation to the First Circuit's treatment of the §2110 cases cited above and relying on the dicta set out in those cases regarding §1998 situations. This Court must determine here whether the taxes must be paid under protest by December 31 of the tax year

in order to preserve the taxpayer's right to judicial review. No other court has specifically ruled on this issue.

The plaintiff argues this §1998 cause of action is separate and distinct from a §2110 cause of action. It further argues that a §1998 case affords a taxpayer a right to appeal a decision of the Tax Commission to the district court *only* after the Commission has ruled. It argues that its appeal to this Court within thirty days was, therefore, timely. It further argues that payment under protest of the taxes prior to the Tax Commission decision would have divested the Commission of jurisdiction to render any decision at all, citing La. R.S. 47:1990. This Court, however, does not agree with that interpretation of that statute, particularly in cases regulated by the appeal procedure set forth in La. R.S. 47:1992 et seq, as utilized by petitioner here.

The First Circuit has consistently, continually, and recently held that taxes "paid under protest" must be paid prior to becoming delinquent and that taxes paid after the due date of December 31 of the tax year are delinquent taxes, defeating a claim for recovery of delinquent taxes paid under protest under §2110. See *Comm-Care Corporation v. La. Tax Commission, supra.*

Plaintiff's argument is essentially that La. R.S. 47:1998 A (2) allows a taxpayer to await the Tax Commission decision before payment under protest is required. In many cases, the issue would never arise were the Tax Commission decision is rendered before the end of the tax year. Here, however, the Tax Commission was rendered after the taxes became delinquent.

This Court can not ignore the construction of the term "due" adopted by the First Circuit in the recent *Comm-Care* decision. That decision delineates between taxes that are "due" and taxes that are "delinquent." Therefore, the taxes paid in this matter were not *due* but were *delinquent* when paid. No where does the administrative scheme provide that a taxpayer's use of the administrative appeal procedure operates as a stay or suspension of the obligation to pay a tax timely by December 31 of the tax year. In determining whether any particular statute specifically requires that taxes must be paid prior to December 31 to preserve the right to seek judicial review of the Tax Commission decision, the provisions of La. R.S. 47:1998 A (2) must be considered:

> Any taxpayer who has filed suit under these provision [La. R.S. 47:1998 A] and whose taxes have become due shall pay such taxes *under protest* . . .

The only statute dealing with payment under protest in the context of ad valorem taxes is La. R.S. 47:2110. The First Circuit has held that the right to recover taxes paid under protest has prescribed where the taxes were not paid by December 31.

Accordingly, this Court feels constrained to hold that two requirements must be met in order to preserve the right to judicial review of the Tax Commission decision: (1) suit must be filed within thirty days of the decision; and (2) the taxes must be paid under protest. According to the First Circuit line of cases, payment under protest must be made before December 31 of the tax year; and there exists no right to pay delinquent taxes under protest. Because the plaintiff has

failed to *timely* satisfy the second requirement, this Court must find that its suit has prescribed. In line with the First Circuit decisions on the §2110 cases regarding payment under protest, the decision cannot be otherwise.

Accordingly, this suit for judicial review has prescribed. The exception of prescription will be maintained; and petitioner's suit will be dismissed with prejudice at petitioner's cost.

**NO CAUSE OF ACTION**

In light of this Court's ruling on the exception of prescription, the exception of no cause of action need not be decided.

Judgment will be signed upon presentation in conformity with these written reasons.

Baton Rouge, Louisiana, this *9th* day of *October*, 1996.

/s/ Celia R. Cangelosi

Celia R. Cangelosi, Judge
19th Judicial District Court

FILED OCT 9 1996

/s/ Mathilda S Nolan

DY. CLERK OF COURT

I hereby certify that on this day a copy of the written reasons for Judgment was mailed by me, with sufficient postage affixed to : Illegible, McKane, Illegible, _____
Done and signed on *10-10-96*

M. Nolan

Deputy Clerk of Court

**APPENDIX 3**

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**
**97 CA 0555**

**COMM-CARE CORPORATION**

**VERSUS**

**LOUISIANA TAX COMMISSION, ET AL**

**JUDGMENT RENDERED:** *April 8, 1998*

* * * * * *

**ON APPEAL FROM THE**
**NINETEENTH JUDICIAL DISTRICT COURT**
**(NUMBER 425,365), PARISH OF EAST BATON ROUGE,**
**STATE OF LOUISIANA**

**HONORABLE CELIA R. CANGELOSI, JUDGE**

* * * * * *

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et al.

* * * * *

BEFORE CONZALES, PARRO AND GUIDRY, JJ.

GONZALES, J.

This is an appeal by a taxpayer from a judgment granting an exception of prescription in favor of several parish tax assessors.

## FACTS AND PROCEDURAL HISTORY

Comm-Care Corporation (Comm-Care), an entity recognized as a tax-exempt organization by the United States Internal Revenue Service, is the owner and operator of ten nursing homes in nine parishes in Louisiana. Comm-Care sought exemption from 1995 ad valorem taxes with the respective tax assessors in the parishes where its nursing homes are located. The parish tax assessors denied Comm-Care's requests, and Comm-Care administratively appealed to the respective parish boards of review, pursuant to La. R.S. 47:1992(C). All parish boards of review affirmed the assessors' decisions, and Comm-Care appealed to the Louisiana Tax Commission (Tax Commission), pursuant to La. R.S. 47:1992(D).

In February of 1996, the Tax Commission held a hearing on the matter and subsequently determined that Comm-Care was not exempt from paying the 1995 ad valorem taxes. On February 13, 1996, Comm-Care paid the taxes under protest, and on February 27, 1996, filed a petition for judicial review of the Tax Commission's decision in the trial court, pursuant to La. R.S. 47:1998(A)(1), naming the Tax Commission, the parish tax assessors, and the sheriffs of the respective parishes as defendants.

The assessors therafter filed exceptions of no cause of

action and prescription. In support of their exception of prescription, the assessors argued tha Comm-Care's payment of the 1995 ad valorem taxes in 1996 was untimely, and to preserve its right to challenge the Tax Commission's decision, Comm-Care was required to have paid the taxes in 1995, the calendar year in which the taxes were due. On May 6, 1996, the trial court held a hearing on the exceptions, and on October 17, 1996, signed a judgment granting the assessors' exception of prescription and dismissing Comm-Care's petition with prejudice. From this adverse judgment,Comm-Care appeals.

## DISCUSSION

This court has previously held that, in order to maintain a taxpayer challenge to an ad valorem tax under La. R.S. 47:2110, a taxpayer must have paid the tax under protest in the calendar year in which the tax was due. *Comm-Care Corporation v. Louisiana Tax Commission*, 96-0039 (La. App. 1st Cir. 9/27/96), 681 So.2d 1001, *aff'd. on other grounds, sub nom, Comm-Care Corporation v. Bishop*, 96-1711 (La. 1/21/98), ____ So.2d ____, 1998 WL 23173 *on rehearing*); *Capital Drilling Company v. Graves*, 496 So.2d 487(La. App. 1st Cir. 1986).

In granting the assessors' exception of prescription herein, the trial court determined that the rationale of the above cases applied equally to a taxpayer's challenge to an ad valorem tax under the administrative procedure provided in La. R.S. 47-1992, 1989, and 1998. After a thorough review of the record and prior jurisprudence, we find no error in the trial court's judgment. We reach this conclusion without deciding whether the trial court properly granted the

assessors' exception of prescription, or if instead, the case should have been dismissed for Comm-Care Corporation's failure to state a cause of action or a right of action. *See Comm-Care Corporation v. Bishop*,96-1711 (La. 1/21/98), ____ So.2d ____, 1998 WL 23173 (*on rehearing*).

## DECREE

For the foregoing reasons, the October 17, 1996 judgment of the trial court, dismissing Comm-Care's petition with prejudice, is **AFFIRMED**. Costs of this appeal are assessed to Comm-Care Corporation.

## APPENDIX 4

## THE SUPREME COURT
## OF THE STATE OF LOUISIANA

COMM-CARE CORPORATION

VS. NO. 98-C - 1216

LOUISIANA TAX COMMISSIION, ET AL.

---

June 19, 1998

Denied.

WFM
PFC
CDK
BJJ
JPV
CDT
JTR

LEMMON, J. not on panel.

Supreme Court of Louisiana
June 19, 1998

/s/ Illegible
Clerk of Court
for the Court

## APPENDIX 5

### § 2110. Suits to recover taxes paid under protest

A. No court of this state shall issue any process whatsoever to restrain the collection of an ad valorem tax imposed by the state, or by any political subdivision thereof, under authority granted to it by the legislature or by the constitution. Any person resisting the payment of any amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto, shall pay the amount found due to the officer designated by law for the collection of such tax and shall give him and the officer or agency that has given rise to the cause of action notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is filed within such time for the recovery of the tax, then that portion of the taxes paid that are in dispute shall be deemed as paid under protest and such amount shall be segregated and shall be further held pending the outcome of the suit. That portion of the taxes paid by the taxpayer to the officer which is not in dispute shall not be made subject to the protest. If the taxpayer prevails, the officer shall refund the amount to the taxpayer with interest at the actual rate earned on the money paid under protest in the escrow account during the period from the date such funds were received by the officer to the date of such refund. If the taxpayer does not prevail, the taxpayer shall be liable for the additional taxes together with interest at the rate set forth above during the period from the date the notice of intention to file suit for recovery of taxes was given to the officer until the

date such taxes are paid.

B. The right to sue for recovery of a tax paid under protest as provided herein shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter for a full and complete adjudication of any and all questions arising in the enforcement of such right respecting the legality of any tax accrued or accruing or the method of enforcement thereof. In any such suit, service of process upon the officer or agency designated and provided for in R.S. 47:1998(A)(2) or (B)(3) or Subsection A of this Section shall be required.

C. The right to sue for recovery of a tax paid under protest as provided herein shall afford a legal remedy and right of action at law in the state or federal courts where any tax or the collection thereof is claimed to be an unlawful burden upon interstate commerce, or in violation of any act of the Congress of the United States, the Constitution of the United States, or the constitution of the state. Upon request of a taxpayer and upon proper showing by such taxpayer that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, the taxpayer, upon agreement to abide by the pending decision of the courts, may pay the additional assessment under protest but need not file an additional suit. in such cases the tax so paid under protest shall be segregated and held by the officer designated by law for the collection of such tax until the question of law involved has been determined by the courts and shall then be disposed of as provided in the decision therein.

D. An assessment valuation shall be challenged only

**pursuant to the method or procedures as provided first in R.S. 47:1992, then R.S. 47:1989, and finally R.S. 47:1998.**

**E. Any taxpayer in the state who has paid his taxes under protest as provided herein and who has filed suit under the provisions of R.S. 47:1856, R.S. 47:1857, or R.S. 47:1998, shall cause to issue in said suit notice to the officer or officers designated for the collection of said taxes in the parish or parishes where the property is located, and such notice shall be sufficient to cause said officer or officers to further hold said amount segregated pending the outcome of the suit.**

# APPENDIX 6

## § 2101. *Time for payment; notice when due*

A. (1) All taxes shall be collected in the calendar year in which the assessment thereof is made, and they shall be designated as the "taxes for the year ____", accordingly as they are collectible, and the taxes assessed in each year shall be due in that calendar year as soon as the tax roll is filed in the office of the recorder of mortgages, except taxes on movable property in the event of a bulk sale under the provisions of the Bulk Sales Law,[1] and they shall be paid on or before the thirty-first day of December in each respective year in order to avoid the notice, advertisement, and sale required by Article VII, Section 25 of the Louisiana Constitution. In the event of a bulk sale of movable property under the provisions of the Bulk Sales Law, all taxes due on movable property shall be due ten days prior to completion of the tansfer or the payment of any consideration therefor and shall be payable upon completion of the bulk sale.

(2) No forced collection of taxes on movable property shall be made before the first day of February of the succeeding year unless the collector has good reason to believe that the state, parish, or municipal corporation will lose the collection.

(3) The interest on all ad valorem taxes, whether levied on movable or immovable property, which are delinquent shall begin on the thirty-first day of December of each and every year and shall bear interest from December thirty-first of such year until paid, at the rate of one percent per month or any part therof. In the event of an erroneous assessment

and adjustment by the tax commission, the taxpayer shall have fifteen days from receipt of notice of the revised assessment in which to pay the adjusted amount without interest penalty. If the address provided by the tax assessor on the tax roll proves to be incorrect and the tax debtor does not receive a timely notice, the tax collector may extend to the debtor a fifteen-day notice in which to pay without interest penalty.

B. (1) Immediately following the filing of the tax roll by the assessor in each calendar year, the tax collector with whom such tax roll is filed shall mail a notice in addition to the notices required elsewhere in this Title, by postcard or letter, to each tax debtor listed on the tax roll at the address shown on such roll. This notice shall disclose the total amount of taxes due by the tax debtor for the current year, the ward in which the property taxed is located, and the number of the assessment.

(2) In addition to the notice to the tax debtor, the tax collector shall also send a notice to each person holding a properly recorded mortgage on immovable propery if such mortgagee has notified the tax collector of such recorded mortgage and has requested the notice of taxes due. If the mortgagee has designated another person to receive the notice, the tax collector shall send a notice of taxes due to that person. The notification by the mortgagee to the tax collector shall state the legal description of the immovable property and the name of the record owner. The mortgagee requesting notice shall pay a reasonable sum to the sheriff to defray the cost of providing the notice. The notification by the mortgagee to the tax collector shall be renewed annually. The notice to the mortgagee may be in the form of a computer printout.

C. the notice shall request the tax debtor to return the notice to the tax collector with remittance, and shall remind the tax debtor of the date that taxes become delinquent following issuance of such notice and that interest will accrue on the taxes from and after the date the taxes become delinquent. Interest shall accrue at the rate prescribed by law, which rate, or a brief description of the manner in which the rate is calculated, shall be stated in the notice.

D. Failure of the collector to send this notice or failure of the taxpayer assessed to receive the notice shall not affect any sale for taxes of any of the property assessed upon which the taxes are not paid.

E. The provisions of this Section requiring a notice to the taxpayer shall in no way affect and shall not be held to be inconsistent or in conflict with the provisions of R.S. 47-2171, 47:2180, 47:2181, or 47:2189, or any other Section relating to notice to tax debtors.

## APPENDIX 7

**§ 1992. Inspection of assessment lists: notification and review of assessments by board or review, hearing officers**

A. (1) After each assessor has prepared and made up the lists showing the assessment of immovable and movable property in and for his parish or district, his lists shall be exposed daily for inspection by the taxpayers and other interested persons for the period provided for in Subsection G of this Section. Each assessor shall give notice of such exposure for inspection in accordance with rules and regulations established by the Louisiana Tax Commission.

(2) A property owner or authorized agent of the property owner may make a written request for notice of the current year's assessment of the property of which he is the owner; however, such request shall be made no sooner than the first day of June of that year, and such request shall be received by the assessor of the parish or district in which the property is located no later than June fifteenth of that same year. The authorized agent of the taxpayer shall provide with the request for the assessment, written authorization from the taxpayer for that agent to act as the authorized agent of the taxpayer in the request of the notice of an assessment. The property owner shall provide to the assessor at the time of the mailing of the notice, appropriate means for the return of the notice such as a self-addressed stamped envelope of sufficient size and adequate postage to hold the notice requested. The assessor, at no cost to him, shall deliver to the property owner through the means provided by the proper-

ty owner a written notice of the assessed value of the property no later than the close of business on the third day for inspection of the assessment lists as provided for in Subsections F and G of this Section. However, the failure to provide the written notice provided in this Paragraph shall not result in any extension of time for an appeal of assessment.

B. After the lists of each assessor have been exposed for inspection for the period provided for in Subsection G of this Section, the lists as changed by each assessor shall be certified to the board of review within three days, which board shall conduct public hearings for all persons or their representatives desiring to be heard on the assessments of immovable and movable property. Notice of such public hearings shall be given by each assessor in accordance with rules and regulations established by the tax commission.

C. The board of review shall consider the written or oral complaint of any person desiring to be heard who has timely filed the report or reports as required by Chapter 6 of Subtitle III of Title 47, R.S. 47:2301 et seq., and who has provided to the board of review at least seven days prior notice either through appearing in person at the board of review's office or by filing such complaint by means of certified mail. Contrary provisions of law notwithstanding, the written or oral complaint of any bona fide representative of an affected tax recipient body shall be considered by the board of review provided such representative has provided at last seven days prior notice to the board in the manner provided in this Section and has furnished the owner's name and address, a description of each property contested, and the assessment number of each property contested; nothing contained herein

shall be construed to authorize a tax recipient body to challenge the assessment of all property within its taxing jurisdiction in a single complaint. The validity of each assessment shall be determined on its own merits using recognized appraisal techniques. The board of review may make a determination to increase or decrease the assessment of immovable or movable property made by the assessor in accordance with the fair market or use valuation determined by the board.

D. All determinations by the board of review shall be final unless appealed to the tax commission. Any taxpayer or assessor dissatisfied with the determination of the board of review may appeal to the tax commission in accordance with rules and regulations established by the tax commission.

E. On the fifteenth day after the board of review shall have commenced the public hearings as provided herein, the assessment lists, together with any changes in connection therewith, shall be certified and sent to the tax commission within three days.

F. In Orleans Parish, the procedure for review of assessments shall be as follows:

(1) Each assessor shall prepare and make up the lists showing the assessment of immovable and movable property in and for his district; the lists shall be exposed daily, except Saturday, Sunday, and legal holidays for inspection by the taxpayers and other interested persons during the period August first through August fifteenth of each year unless August fifteenth falls on a weekend or a legal holiday, when the period shall extend until the next business day. Each

assessor shall give notice of such exposure for inspection in accordance with rules and regulations established by the Louisiana Tax Commission. On or before the tenth business day after August fifteenth, the assessors shall certify their rolls to the board of review.

(2) The board of review shall consider all written complaints which have been filed in compliance with the following procedure:

(a) The complaint form provided by the board, through the office of the assessor, must be completed in conformity with the requirements of the board of review.

(b) The complaint form must be received in the assessor's office within three business days after August fifteenth.

(c) The form must be forwarded by the assessor and received by the board of review within seven business days after August fifteenth.

(d) The taxpayer must have timely filed the reports as required by R.S. 47:2301 et seq. and R.S. 47:2321 et seq.

(3) The board of review shall convene hearings on or before September fifteenth. The board may create one or more hearing officers, any one of whom shall be a member of the board of review and who may conduct all required public hearings of the board with or without the presence of the other members, provided that no final action may be taken by such board of review unless a quorum is present. The board may make a determination to increase or decrease the assess-

ment of real or personal property made by the assessor in accordance with the fair market or use valuation determined by the board.

(4) The board of review shall certify the assessment list to the Louisiana Tax Commission on or before October twentieth of each year.

G. The period for inspection of the assessment lists as provided for in this Section in each parish, except Orleans, shall, for the tax year beginning 1990 and in every tax year thereafter, for a period of fifteen days, beginning no earlier than August 15 and ending no later than September 15.

# APPENDIX 8

## § 1998. Judicial review, generally

A. (1) Any taxpayer or bona fide representative of an affected tax-recipient body in the state dissatisfied with the action of the tax commission under the provisions of R.S. 47:1989, shall have the right to institute suit within thirty days of the decision of the tax commission in either the district court for the parish where the tax commission is domiciled or the district court of the parish where the property is located contesting the correctness of assessment. Any taxpayer who owns property assessed in more than one parish may institute this suit in either the district court for the parish where the tax commission is domiciled or the district court of any one of the parishes in which the property is located and assessed, provided at least twenty-five percent of the parishes where the property is located are named in the suit. However, if at least twenty-five percent of the parishes are not named in the suit, then suit must be filed in the parish where the property is located.

(2) Any taxpayer who has filed suit under this provision and whose taxes have become due shall pay such taxes under protest and shall cause to issue notice to the officer designated by law for the collection of such tax under the provisions of R.S. 47:2110(E), and shall cause service of process to be made on the Louisiana Tax Commission as the officer designated by law to assess the property as provided for in R.S. 47:2110(B). However, the portion of taxes that is not in dispute shall be paid without being made subject to the protest.

B. (1) Any taxpayer or bona fide representative of an affected tax- recipient body in the state shall have the right to institute suit in either the district court for the parish where the tax commission is domiciled or the district court of the parish where the property is located, for the purpose of contesting the correctness or legality of any change in assessment made against the property under written instructions of the tax commission, pursuant to R.S. 47:1990, which suits must be instituted within thirty days after the date of the written instructions of the tax commission ordering the change.

(2) Any taxpayer who owns property assessed in more than one parish may institute this suit in either the district court for the parish where the tax commission is domiciled or the district court of any one of the parishes in which the property is located and assessed provided at least twenty-five percent of the parishes where the property is located are named in the suit. However, if at least twenty-five percent of the parishes are not named in the suit, then suit must be filed in the parish where the property is located.

(3) Any taxpayer in the state who has filed suit under these provisions and whose taxes have become due shall pay said taxes under protest and shall cause to issue a notice to the officer designated by law for the collection of such tax under the provisions of R.S. 47:2110(E), and shall cause service of process to be made on the Louisiana Tax Commission as provided for in R.S. 47:2110(B). However, the portion of taxes that is not in dispute shall be paid without being made subject to the protest.

C. The assessor shall bring suit, when necessary to protect the interest of the state, and shall also have the right of appeal and such proceedings shall be without cost to him or the state.

D. In all suits relating to property taxes the judge shall hear and try such cases without delay, in chambers if necessary, without cost to the reviewers or the assessors.

E. The plea of estoppel shall never be allowed by the courts of this state in matters of local or municipal assessments where there are radical defects in the proceedings leading up to such local assessments, but such plea shall have full effect as against mere subsequent irregularities or informalities therein where no protest has been made thereto, provided that nothing contained in this Subsection shall apply to the levying of taxes for the security of any issuance of bonds.

F. If the assessed valuation finally determined under this Section is greater than the taxpayer's own assessed valuation, the court shall enter judgment against the taxpayer for the additional taxes due together with interest at the actual rate earned on the money paid under protest in the escrow account during the period from the date of notice of intention to file suit for recovery of taxes pursuant to R.S. 47:2110(E) until paid. If the taxpayer prevails in his suit to recover taxes paid under protest, the appropriate amount of taxes shall be refunded to the taxpayer together with interest at the rate set forth above during the period from the date of payment until the date of such refund.

**APPENDIX 9**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

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**NO. 97/CA/0555**

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**COMM-CARE CORPORATION**

**VERSUS**

**LOUISIANA TAX COMMISSION, et al**

---

**ORIGINAL BRIEF ON BEHALF OF APPELLANT COMM-CARE CORPORATION ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE THE HONORABLE CELIA R. CANGELOSI, JUDGE DIVISION "M", CIVIL DOCKET NO. 425,365**

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CIVIL CASE

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## STATEMENT OF THE CASE

Comm-Care Corporation ("Comm-Care") was organized on January 12, 1984. Article 2 of its Articles of Incorporation states:

> This corporation is organized and shall be operated exclusively for charitable, scientific, and educational purposes.

On May 16, 1984, the Internal Revenue Service determined that Comm-Care was organized for charitable, scientific and educational purposes, and therefore declared the corporation to be exempt from federal income taxes under §501(c)(3) of the Internal Revenue Code. On December 29, 1992, Comm-Care adopted amended and restated Articles of Incorporation. Article 2 of the amended Articles of Incorporation states:

> This corporation is organized and shall be operated exclusively for charitable, scientific and educational purposes.

On April 15, 1993, the Internal Revenue Service determined that Comm-Care under its amended articles remained exempt under Code §501(c)(3), and that Comm-Care's proposed acquisition and operation of ten nursing homes in Louisiana were consistent with its charitable exempt purposes.

On March 1, 1994, in keeping with the Service's ruling letter, Comm-Care bought ten nursing-home facilities (the

"Facilities") located in nine parishes in Louisiana.[1]

For 1995 ad valorem tax purposes, Comm-Care timely filed renditions with the assessors claiming the Facilities to be exempt under Article VII, Section 21B(1)(a)[2] of the Louisiana Constitution of 1974. The assessors disallowed Comm-Care's claims for exemption, and Comm-Care timely filed Notice of Appeal with the respective parish Boards of Review, pursuant to La. R.S. 47:1992(C). All of the Boards of Review affirmed the decisions of the assessors, and Comm-Care timely appealed to the Tax Commission pursuant to La. R.S. 47:1992(D).

On February 13, 1996, following a hearing and the introduction of overwhelming and uncontroverted evidence, the Commission found that "Comm-Care Corporation is a non-profit corporation operated for health and welfare purposes, exempt from federal and state income taxation as required in the 1974 Constitution, Article VII, Section 21B(1)(a)" However, the Commission, despite its finding that Comm-Care satisfied the constitutional requirements, ruled that Comm-Care's Facilities were somehow not exempt from ad valorem taxation: "The Commission further finds that after reviewing all the evidence presented by the parties in the proceeding, that Comm-Care was not operating the nursing homes in a 'charitable' manner. The Commission further

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[1] The tax-exempt status of the Facilities for 1994 is the subject of a separate lawsuit presently before the Supreme Court. See footnote 6.

[2] Art. VII, section 21B(1)(a) provides for ad valorem tax exemption for the following Property owned by a non-profit corporation or association organized and operated exclusively for...charitable, health, welfare...purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax...

finds that the nursing homes appear to be operated in the same manner as any "for-profit" organization would operate."

Comm-Care paid the 1995 taxes under protest on February 13, 1996, the same day the Tax Commission rendereed its decision, and on February 27, 1996, within thirty (30) days of the Tax Commission's decision. Comm-Care filed its Petition for Judicial Review with the Nineteenth Judicial District Court pursuant to La. R.S. 47:1998.[3]

On October 17, 1996, Judge Celia R. Cangelosi of the 19th Judicial District for the Parish of East Baton Rouge maintained the defendants' exception of prescription on grounds that Comm-Care failed to pay the contested taxes when "due" (December 31, 1996,) and dismissed the appeal with prejudice at plaintiff's cost. A copy of the Judgment on Exceptions and the Written Reasons for Judgment are attached hereto as Exhibits A and B, respectively.

Plaintiff brought a devolutive appeal to this Court and applied for a writ of certiorari to the Supreme Court on the same grounds. The Supreme Court granted the writ and transferred the case to this Court, which declined to exercise supervisory jurisdiction over an appealable decision.

## SPECIFICATION OF ERRORS

1. The trial court erred in maintaining defendants' exception of prescription because the statute under which this appeal of the Tax Commission's decision arises does not require that the subject taxes must be paid when "due."

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[3] Comm-Care also satisfied the requirement of La. R.S. 47:2110(E) by paying the taxes under protest and filing suit within thirty days.

2. The trial court erred by reading La. R.S. 47:1998 in *pari materia* with La. R.S. 47:2110 and therby reading into La. R.S. 47:1998 its own interpretation of La. R.S. 47:2110, that an appeal to the District Court under La. R.S. 47:1998 will not lie if the subject taxes are not paid when "due" on December 31 of the tax year when it was impossible for Com-Care to pay the tax when "due" without divesting the Tax Commission of its jurisdiction before it decided the case before it.

3. The trial court erred by denying Comm-Care judicial review of the Tax Commission's decision in accordance with La. R.S. 47:1998, thereby violating Comm-Care's Due Process rights under the 14th Amendment to the United States Constitution.

## ARGUMENT

### A. THE TRIAL COURT ERRED IN MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION BECAUSE THE STATUTE UNDER WHICH THIS CAUSE OF ACTION ARISES DOES NOT REQUIRE THAT THE SUBJECT TAXES MUST BE PAID.

La. R.S. 47:1989-1998 provide an administrative procedure for taxpayers to contest the *correctness* or the *legality* of ad valorem tax assessments. This process involves a protest to the assessor, an appearance before the local board of review, an appeal to the Louisiana Tax Commission, and a review by the District Court on a petition for appeal filed within thirty days of the Commission's decision.

La. R.S. 47:1998 provides:

> A. (1) Any taxpayer or bona fide representative of an affected tax-recipient body in the state dissatisfied with the action of the tax commission under the provisions of La. R.S. 47:1989 shall have the right to institute suit within thirty days of the decision of the tax commission in either the district court for the parish where the tax commission is domiciled or the district court of the parish where the property is located contesting the correctness of the assessment.
>
> * * * * * * * * * * * *
>
> (2) Any taxpayer who has filed suit under this provision and whose taxes have become due shall pay said taxes under protest and shall cause to issue notice to the officer designated by law for the collection of such tax under the provisions of La. R.S. 47:2110(E) *and shall cause service of process to be made on the Louisiana Tax Commission and the officer designated by law to assess the property as provided for in La. R.S. 47:2110(B).* However, the portion of taxes that is not in dispute shall be paid without being made subject to the protest. (Italicized language added by Acts 1995, No.272 §1, effective July 1, 1995.)

"[P]ayment 'under protest' is not required to contest ad valorem assessments by the administrative procedure, *see* La. R.S. 47:1992 but instead is only necessary when suit is filed in district court, either after the pursuance of administrative remedies, *see* La. R.S. 47:1998 (A)&(B), or when

a direct lawsuit attacking the validity of an assessment is filed in district court. *See* La. R.S. 47:2110(A)." *Rickey Tri-Key Partnership v. Dupleix*, 462 So. 2d 235, 238 (La. App. 3d Cir. 1984). *writ denied.* 464 So. 2d 1385 (La. 1985).

This is a §1998 case arising out of Comm-Care's contest of the 1995 assessments by the prescribed administrative procedure. Comm-Care filed renditions claiming exemption and appeared before the local boards of review requesting that its tax-exempt status be recognized and the subject properties be placed on the tax-exempt rolls. When the assessments were affirmed by the boards, Comm-Care appealed to the Tax Commission whose decision was not handed down until February 13, 1996, after the taxes had become "due." Comm-Care paid the taxes under protest the same day and filed its petition for review in the 19th Judicial District Court within thirty (30) days following the Tax Commission's decision. Comm-Care did not pay the taxes by December 31 while its appeal to the Tax Commission was still under advisement because the Tax Commission would have been divested of jurisdiction. La. R.S.47:1990 provides:

> "The tax commission may change or correct any and all assessments of property for the purpose of taxation, in order to make the assessments conform to the true and correct valuation, not to exceed its actual cash value. **Such change or correction may be made by the tax commission at any time before the taxes levied have actually been paid." (Emphasis added).**

The defendant assessors filed an exception of prescription to Comm-Care's appeal to the District Court on the

grounds that the taxes had not been paid when "due". The trial court maintained the exception, relying on this Court's holdings in *Capital Drilling*[4] and *Comm-Care Corporation v. Louisiana Tax Commission*.[5] pending before the Supreme Court.[6]

The lower court decided that the word "due" in La. R.S. 47:1998 means that the taxes must be paid by December 31 of the tax year in order that an appeal from an adverse decision of the Tax Commission will lie. It is respectfully submitted, however, that this interpretation renders meaningless the overall scheme of La. R.S. 47:1989-1998 setting forth the process for the contest of assessments administratively. Under the trial Court's interpretation, the Tax Commission need never decide another case, only hold them under advisement past December 31. If the taxpayer pays "timely" the Tax Commission is divested of jurisdiction and the taxpayer is relegated solely to the La. R.S. 47:2110 remedy, a *de novo* suit for refund in the district court. If the taxpayer does not pay "timely," the case is over because its right to appeal under La. R.S. 47:1998 has prescribed.

**B. THE TRIAL COURT ERRED IN READING LA. R. S. 47:1998 IN *PARI MATERIA* WITH LA. R.S. 47:2110.**

The trial court erred in applying this Court's holding in

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[4] *Capital Drilling Company v. Graves*, 496 So.2d 487, (La. App. 1st Cir 1986).

[5] No. 96-0039 (La. App. 1st Cir. 9/27/96).

[6] Docket No. 96-C-1711 c/w 96-C-2455.

*Comm-Care Corporation v. Louisiana Tax Commission*, a case brought under §2110, to this case brought under §1998.

In *Churchill Farms, Inc. v. Louisiana Tax Commission*, 338 So.2d 963 (La. App. 4th Cir. 1976), the Tax Commission asserted that La. R. S. 47:2110 must be read in *pari materia* with La. R.S. 47:1998 to preclude *Churchhill* from bringing suit because it had failed to fulfill the prerequisite of filing a sworn list of property and its valuation pursuant to the condition precedent of La. R.S. 47:1998. *Churchill* paid its 1969 taxes under protest in 1971 over one and a half years after the taxes were due and filed suit within the requisite thirty (30) days. The issue of timely payment was not addressed; however, the suit was allowed and was ultimately successful. The Court reasoned that an action under La. R.S. 47:2110 is a separate right in no way dependant on La. R.S. 47:1998. *Id.* at 965. Thus, the La. R.S. 47:1998 condition precedent of filing a sworn list is not to be read by implication into La. R.S. 47:2110 as a prerequisite to a suit for refund.

By the same token, a condition of La. R. S. 47:2110 cannot be read into La. R.S. 47:1998 as a prerequisite to an appeal of a decision of the Tax Commission. As stated in *Churchill*, the rights of action of La. R.S. 47:1998 and La. R.S. 47:2110 create separate rights of action arising out of separate sets of circumstances not subject to the conditions or prerequisites of each other.

The district court's decision here is contrary to that of the Third Circuit in *Rickey Tri-Key Partnership v. Dupleix*, 462 So.2d 235, 236 (La. App. 3d Cir. 1985), *writ denied*, 464 So.2d 1385 (La. 1985), a §1998 case regarding property assessed for 1982, wherein the taxes were paid in January, 1983 while an appeal was pending before the Tax Commission,

following which the Tax Commission affirmed the assessment.[7] The taxpayer then appealed to the district court, within thirty (30) days of the decision, but more than (30) days after payment. The defendants excepted on the grounds that the suit was untimely because filed more than thirty days after payment. The Third Circuit held the suit was timely. It stated:

> La. R.S. 47:1998(A) expressly gives appellant the right to contest an adverse decision of the Tax Commission in district court within thirty days of that decision. *Rickey,* 462 So.2d. at 236.

The Court correctly differentiated between La. R.S. 47:2110, which requires that suit be filed within thirty (30) days of *payment* under protest, and La. R.S. 47:1998, which requires suit be filed within thirty (30) days of the Tax Commission's decision *Id.* at 236-237. In other words, the Third Circuit concluded that La.R.S. 47:1998 has only **one** prerequisite: the filing of suit within thirty (30) days of the *Tax Commission's decision* without regard to the date of payment.

Comm-Care filed its petition within the requisite thirty (30) days following the Tax Commission's decision, as required by La. R.S. 47:1998. The trial court has imposed additional prerequisites that are not found in the statute to deny Comm-Care's right to judicial review. Comm-Care satisfied the requirements of La. R.S. 47:1998, and cannot be precluded from seeking judicial review of the tax commission's adverse determination.

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[7] Evidently, the Tax Commission affirmed the assessment under La.R.S. 47:1990 when the taxes were paid.

## C. THE TRIAL COURT ERRED BY MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION IN A §1998 CASE WHEN IT WAS IMPOSSIBLE TO PAY THE TAXES WHEN "DUE" WITHOUT DIVESTING THE TAX COMMISSION OF ITS JURISDICTION.

Under the requirement imposed by the trial court, a taxpayer would be required to pay the tax at issue prior to a decision by the Tax Commission. This cannot have been intended by the legislature because payment during the pendency of the case before the Tax Commission divests the Tax Commission of jurisdiction over the case:

> The Tax commission may change or correct any and all assessments of property for the purpose of taxation, in order to make the assessments conform to the true and correct valuation, not to exceed its actual cash value. **Such change or correction may be made by the tax commission at any time before the taxes levied have been paid.** La. R.S. 47:1990 (Emphasis added).

"According to the clear language of La. R.S. 47:1990 quoted above and a long line of previous Attorney General's opinions, it is the opinion of this office that the Louisiana Tax Commission is without authority to change or correct any assessment of property after the taxes levied pursuant to the assessments have actually been paid." Opinion 77-1475, 1976-77 La. Op. Atty. Gen. 316 (1977).

Thus the Tax Commission only has jurisdiction before the taxes are paid. An examination of the statutes shows that no payment of taxes during the administrative process is

required. To require payment of taxes before a final administrative decision would terminate the administrative process and relegate a taxpayer solely to a post-deprivation remedy.

### D. THE TRIAL COURT ERRED BY DENYING COMM-CARE JUDICIAL REVIEW IN ACCORDANCE WITH LA. R.S. 47:1998 THEREBY DENYING IT DUE PROCESS OF LAW.

Imposition of a tax is a taking of property. Under the Fifth and Fourteenth Amendments to the United States Constitution, the power to tax is legally exerted only if, at some stage, the taxpayer is given an opportunity to contest illegal exactions in keeping with due process principles. *Central of Georgia R. Co. v. Wright,* 207 U.S. 127 (1907); *Mitchell v. M.T. Grant Company,* 416 U.S. 600 (1974).

Due process under the Fifth and Fourteenth Amendments require the states to provide a "clear and certain" remedy for aggrieved taxpayers to contest tax assessments. See *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco.* 496 U.S. 18, 36-36 (1990), citing *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239 (1931); *Montana National Bank of Billings v. Yellowstone County,* 276 U.S. 499 (1928); *Carpenter v. Shaw,* 280 U.S. 363 (1930); *Ward v. Board of County Commissioners of Love County,* 253 U.S. 17 (1920); *Atchison, T. & S.F.R. Co. v. O'Connor,* 223 U.S. 280 (1912). Otherwise an unlawful tax exaction constitutes a deprivation of property without due process of law. A state may provide the requisite procedural safeguards either in the form of pre-deprivation relief, post-deprivation relief or both. *Reich v. Collins,* 115 S.Ct. 547 (1994).

The due process issue presented in this case is whether La.R.S. 47:1998, as interpreted and applied by the trial court, constitutes "clear and certain" pre-deprivation relief.

In *Carpenter v. Shaw,* U.S. 363 (1930), the Choctaw Indian Tribe avoided a distress sale by paying property taxes under protest. The Supreme Court of Oklahoma denied the Tribe's right to recover based on a provision of the state statute which allowed a refund suit only if the tax was paid timely.

The Supreme Court reversed its ruling and held that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter* at 369.

The case at hand deals with a claim of exemption under the State's constitution, not a federal law. Nevertheless the holding in *Carpenter* is still applicable. "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of the law." *Brinkerhoff-Farris Trust & Savings Co. v. Hill,* 281 U.S. 673, 682 (1930).

"If a taxpayer proves his tax burden is onerous due either to an invalid law or unequal enforcement of a valid levy, the net result is the same and the compliant rises to constitutional magnitude in that there is a deprivation of property without due process of law." *Churchill, supra* at 965.

While the states are free to determine whether to provide a pre-deprivation remedy, a post-deprivation remedy, or both, the remedy or remedies it does provide must give

taxpayers "clear and certain" relief. *Reich v. Collins,* 115 S.Ct. 547, 550-551 (1994). Louisiana provides both remedies (1) the pre-deprivation administrative proceeding outlined in La. R.S. 47:1989-1998 and (2) the post-deprivation proceeding described in La.R.S. 47:2110.

Comm-Care chose to contest the 1995 assessments pursuant to what it thought was a "clear and certain" pre-deprivation remedy as provided by La.R.S. 1989-1998, and it complied with each and every requirement set forth in those sections, only to be told by the trial court that it had failed to comply with another requirement to be found by reading the statute in *pari materia* with others.[8] This is a clear denial of due process.

In *Reich v. Collins,* 115 S.Ct. 547 (1994), the Court examined the Georgia Supreme Court's application of Georgia's tax refund statute, which provides that "a taxpayer shall be refunded any and all taxes...which are determined to have been erroneously or illegally assessed...whether paid voluntarily or involuntarily." On *Reich's* first appeal, the Georgia Supreme Court construed the refund statute not to apply to "the situation where the law under which the taxes (were) assessed and collected is itself subsequently declared to be unconstitutional." On *Reich's* second appeal, the Georgia Supreme Court reasoned (1) that states may choose to provide pre-deprivation or post-deprivation remedy which *Reich* had failed to follow, therefore it was not a denial of due process to deny *Reich* relief under the State's post-deprivation statute.

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[8] Comm-Care had a right to rely on La.R.S. 47:1989-1998 as written. La. Civil Code Art. 1; *Johnson v. St. Paul Mercury Ins. Co.* 236 So.2d 216 (La. 1970); Tate, *Louisiana and the Civil Law,* 39 La.L.Rev. 727, 743 (1962).

The United States Supreme Court agreed that the states may provide one remedy or the other or both "so long as that scheme is clear and certain...(and the state may) reconfigure its remedial scheme over time...to fit its changing needs. . . *but what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course to bait and switch, as some have described it. "Reich,* 115 S.Ct. 547 at 550.(emphasis added)

This "bait-and-switch" scheme is exactly the result of the trial court's strained interpretation of the statute. The sequence of sections culminating in La. R.S. 47:1998 is clearly designed by the legislature to provide for pre-deprivation relief. The trial court's interpretation of the statute adds an unwritten requirement and produces the same bait-and-switch result proscribed in *Reich.*

**RULES OF STATUTORY INTERPRETATION:**

According to the rules of statutory construction. "[W]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written." La. Civ. Code Art. 9. La.R.S. 47:1998 sets forth the procedure to contest a decision of the Louisiana Tax Commission. Nothing in the statute states that the taxes must be paid within the year for which they are due in order to pursue this remedy.

The legislative intent is to provide taxpayers an opportunity to achieve a resolution before being required to pay. In this context, La. R.S. 47:1998A(1) creates a cause of action for judicial review: it requires only that the petition be filed within thirty (30) days of the Tax Commission's

decision. La. R.S. 47:1998A(2) follows almost as an afterthought: If the taxpayer has filed a suit under A(1) and as of that point in time, the taxes have fallen due, they shall be paid to the proper officer (to prevent a tax sale) with notice as to the pendency of the suit. This provision is necessary because, unlike the federal system the legislature chose not to allow the taxes to remain unpaid pending an appeal but to provide instead that if, as of the time the appeal is filed, the taxes have fallen due, they are to be paid with notice of the suit's pendency. This comports with La. R.S. 47:1990, which states that the Tax Commission retains jurisdiction only so long as the taxes remain unpaid.

The statutory rules of construction require that statutes be strictly construed. "A well-established rule of statutory construction is that the courts will not impute meanings to statutes which will lead to absurd results or extend the statutes to situations which the Legislature never intended should be covered thereby." *Smith v. Town of Vinton*, 25 So.2d 237, 239 (La. 1946). "A statute should not be construed to defeat its purpose." *Kaufman v. State through the Department of Public Safety Drivers' License Division*, 286 So.2d 723, 725 (La. App. 1st Cir. 1973).

The rules of construction of tax statutes require that any doubt must be read in favor of the taxpayer. In *Godchaux Maison Blanche, Inc. v. Broussard*, 590 So.2d 1159 (La. 1991), the Supreme Court wrote: "In interpreting the statutes, we begin from the well-settled premise that taxing statutes must be strictly construed against the taxing authority." *Id.*, p. 1161, citing *Collector of Revenue v. Wells Fargo Leasing Corp.*, 393 So.2d 1244 (La. 1981). "Where a tax statute is susceptible of more than one reasonable interpretation, the construc-

tion less onerous to the taxpayer must be adopted." *Brown v. La.Nasa*, 152 So.2d 33, 36 (La. 1963).

As written. La. R.S. 47:1998 does not lead to absurd consequences or conflict with other ad valorem tax provisions. As interpreted by the trial court it clashes directly with La. R.S. 47:1990, which states that the Tax Commission is divested of jurisdiction if the tax is paid before its decision is reached, which is an absurd result.

## CONCLUSION

La. R.S. 47:1998 was enacted to provide a "clear and meaningful" pre-deprivation remedy. It is clear and unambiguous and not subject to interpretation to read into it timely payment as an additonal requirement. For a court to do so constitutes a denial of due process.

Accordingly, it is respectfully submitted that this Court should reverse the decision of the trial court, thereby overruling all exceptions and allowing Comm-Care its day in court on the merits.

Respectfully submitted,

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## CERTIFICATE

This is to certify that a copy of the above and foregoing has been served upon counsel of record by depositing same in the United States Mail, postage prepaid this ____ Day of April, 1997, at New Orleans, Louisiana.

John A. Stassi II

APPENDIX 10

SUPREME COURT OF LOUISIANA

No.

98 C 1216

COMM—CARE CORPORATION

Plaintiff-Applicant

VERSUS

LOUISIANA TAX COMMISSION, and LEE J. THEVENOT, in his capacity as Assessor for the PARISH OF AVOYELLES; JEWETTE FARLEY, in her capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER in his capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR. in his capacity as Assessor for the PARISH OF ASCENSION; EUGENE CAVANAUGH, in his capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES PARISH; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA; RICH BAILEY, in his capacity as Assessor for the PARISH OF QUACHITA; JOE TORN TRUNZLER, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF CATAHOULA; WILLIE WAYNE HOUCK, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF LINCOLN; WILLIAM

EARL HILTON, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF RAPIDES; FRANK A. HOWARD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF VERNON; HAROLD L. TRIDICO, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF ASCENSION; WILLIAM BELT, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF AVOYELLES; M. BOLIVAR BISHOP, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF BEAUREGARD; ELMER LITCHFIELD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF EAST BATON ROUGE; LAYMON GODWIN, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF QUACHITA

Defendant-Respondent

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ON APPLICATION FOR WRITS OF CERTIORARI OR REVIEW FROM THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE PARISH
THE HONORABLE CELIA R. CANGELOSI JUDGE DIVISION "M"
CIVIL DOCKET NO. 425,365 AND THE FIRST CIRCUIT COURT OF APPEAL 97/CA/0555

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**APPLICATION FOR WRITS OF CERTIORARI OR REVIEW**

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CIVIL CASE

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## WRIT GRANT CONSIDERATIONS

1.

The Court of Appeal decision herein affirming the lower court's sustaining of the exception of prescription conflicts with the decision of the Court of Appeal, Third Circuit, decision in *Rickey Tri-Key Partnership v. Dupleix*, 462 So. 2d 235, 238 (La. App. 3d Cir. 1984), *writ denied*, 464 So.2d 1385 (La. 1985) on the same legal issue as to when payment under protest of ad valorem taxes must be paid to preserve the right to file suit for their return, plus interest and costs.

2.

The Court of Appeal's erroneous interpretation of La.R.S. 47:1998 will cause material injustice and significantly affect the public interest by denying due process to generations of taxpayer who through lack of knowledge or unfortunate circumstances are unable to pay illegal taxes by December 31 of each year.

3.

The Court of Appeal has decided and sanctioned a lower court's decision of a significant issue of law which has not been, but should be, resolved by this Court.

## STATEMENT OF JURISDICTION

This Court has jurisdiction over this application for writ of certiorari or review under Louisiana Code of Civil Procedure Article 2166 in that this application arises from an

affirmance by the Court of Appeal, First Circuit, of the decision of the Nineteenth judicial Court sustaining a peremptory exception of prescription and dismissing Applicant's suit.

## STATEMENT OF THE CASE

Comm-Care Corporation ("Comm-Care") was organized on January 12, 1984. Article 2 of its Articles of Incorporation states:

> This corporation is organized and shall be operated exclusively for charitable, scientific, and educational purposes.

On May 16, 1984, the Internal Revenue Service determined that Comm-Care was organized for charitable, scientific and educational purposes, and therfore declared the corporation to be exempt from federal income taxes under §501(c)(3) of the Internal Revenue Code. On December 29, 1992, Comm-Care adopted amended and restated Articles of Incorporation. Article 2 of the amended Articles of Incorporation states:

> This corporation is organized and shall be operated exclusively for charitable, scientific and educational purposes.

On April 15, 1993, the Internal Revenue Service determined tht Comm-Care under its amended articles remained exempt under Code §501(c)(3), and that Comm-Care's proposed acquisition and operation of ten nursing homes in Louisiana were consistent with its charitable, exempt purposes.

On March 1, 1994, in keeping with the Service's ruling letter, Comm-Care bought ten nursing-home facilities (the "Facilities") located in nine parishes in Louisiana.[1]

For 1995 ad valorem tax purposes, Comm-Care timely filed renditions with the assessors claiming the Facilities to be exempt under Article VII, Section 21B(1)(a)[3] of the Louisiana Constitution of 1974. The assessors disallowed Comm-Care's claims for exemption, and Comm-Care timely filed Notices of Appeal with the respective parish Boards of Review, pursuant to La. R.S. 47:1992(C). All of the Boards of Review affirmed the decisions of the assessors, and Comm-Care timely appealed to the Tax Commission pursuant to La. R.S. 47:1992(D).

On February 13, 1996, following a hearing and the introduction of overwhelming and uncontroverted evidence, the Commission found that "Comm-Care Corporation is a non-profit corporation operated for health and welfare purposes, exempt from federal and state income taxation as required in the 1974 Constitution, Article VII, Section 21B(1)(a)." However, the Commission, despite its finding that Comm-Care satisfied the constitutional requirements, ruled that Comm-Care's Facilities were somehow not exempt from ad valorem taxation: "The Commission further finds that after

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[1] The tax-exempt status of the Facilities for 1994 is the subject of a separate lawsuit presently before the Supreme Court. See footnote 6.

[2] Art. VII, section 21B(1)(a) provides for ad valorem tax exemption for the following: Property owned by a non-profit corporation or association organized and operated exclusively for...charitable, health, welfare...purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax...

reviewing all the evidence presented by the parties in the proceeding, that Comm-Care was not operating the nursing homes in a 'charitable' manner. The Commission further finds that the nursing homes appear to be operated in the same manner as any "for-profit" organization would operate."

Comm-Care paid the 1995 taxes under protest on February 13, 1996, the same day the Tax Commission rendered its decision, and on February 27, 1996, within thirty (30) days of the Tax Commission rendered its decision, and on Febrwuary 27, 1996, within thirty (30) days of the Tax Commission's decision, Comm-Care filed its Petition for Judicial Review with the Nineteenth Judicial District Court pursuant to La. R.S. 47:1998.[3]

On October 17, 1996, Judge Celia R. Cangelosi of the 19th Judicial District for the Parish of East Baton Rouge maintained the defendants' exception of prescription on grounds that Comm-Care failed to pay the contested taxes when "due" (December 31, 1996,) and dismissed the appeal with prejudice at plaintiff's cost. A copy of the Judgment on Exceptions and the Written Reasons for Judgment are attached hereto as Exhibits A and B, respectively.

On April 8, 1998 the Court of Appeal, First Circuit, affirmed the lower court's judgment as to the said exception of prescription.

## ASSIGNMENT OF ERRORS

1. The trial court erred in maintaining defendants'

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[3] Comm-Care also satisfied the requirement of La. R.S. 47:2110(E) by paying the taxes under protest and filing suit within thirty days.

exception of prescription because the statute under which this appeal of the Tax Commission's decision arises does not require that the subject taxes must be paid when "due."

2. The trial court erred by reading La. R.S. 47:1998 in *pari materia* with La. R.S. 47:2110, and thereby reading into La. R.S. 47:1998 its own interpretation of La. R.S. 47:2110, that an appeal to the District Court under La. R.S. 47:1998 will not lie if the subject taxes are not paid when "due" on December 31 of the tax year, when it was impossible for Comm-Care to pay the tax when "due" without divesting the Tax Commission of its jurisdiction before it decided the case before it.

3. The trial court erred by denying Comm-Care judicial review of the Tax Commission's decision in accordance with La. R.S. 47:1998, thereby violating Comm-Care's Due process rights under the 14th Amendment to the United States constitution.

## SUMMARAY OF THE ARGUMENT

La. R.S. 47:1998 was enacted to provide a "clear and meaningful' pre-deprivation remedy. It is clear and unambiguous and not subject to interpretation to read into it payment by December 31 as an additional requirement. For a court to do so constitutes a denial of due process.

## ARGUMENT

### A. THE TRIAL COURT ERRED IN MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION BECAUSE THE STATUTE UNDER WHICH THIS CAUSE OF ACTION ARISES DOES NOT REQUIRE THAT THE SUBJECT TAXES MUST BE PAID BY DECEMBER 31.

La. R.S. 47:1989-1998 provide an administrative procedure for taxpayers to contest the *correctness* or the *legality* of ad valorem tax assessments. This process involves a protest to the assessor, an appearance before the local board of review, an appeal to the Louisiana Tax Commission, and a review by the District Court on a petition for appeal filed within thirty days of the Commission's decision.

La. R.S. 47:1998 provides:

> A. (1) Any taxpayer or bona fide representative of an affected tax-recipient body in the state dissatisfied with the action of the tax commission under the provisions of La. R.S. 47:1989, *shall have the right to institute suit within thirty days of the decision of the tax commission* in either the district court for the parish where the tax commission is domiciled or the district court of the parish where the property is located contesting the correctness of the assessment. (Emphasis added.)
>
> * * * * * * * * * * * *
>
> (2) Any taxpayer who has filed suit under this provision and whose taxes have become due shall pay said taxes under protest and shall cause to issue notice to the officer designated by law for the collection of such tax under the provisions of L.a R.S. 47:2110(E), and shall cause service of process to be made on the Louisiana Tax Commission and the officer designated by law to assess the property as provided for in La.R.S. 47:2110(B). However, the portion of taxes that is not in dispute shall be paid without being made subject to the protest.

"[P]ayment 'under protest' is not required to contest ad valorem assessments by the administrative procedure, *see* La. R.S. 47:1992, but instead is only necessary when suit is filed in district court, either after the pursuance of administrative remedies, *see* La. R.S. 47:1998(A)&(B), or when a direct lawsuit attacking the validity of an assessment is filed in district court. *See* La. R.S. 47:2110(A)." *Rickey Tri-Key Partnership v. Dupleix*, 462 So. 2d 235, 238 (La. App. 3d Cir. 1984), *writ denied*, 464 So.2d 1385 (La. 1985).

This is a §1998 case arising out of Comm-Care filed renditions claiming exemption and appeared before the local boards of review requesting that its tax-exempt status be recognized and the subject properties be placed on the tax-exempt rolls. When the assessments were affirmed by the boards of review, Comm-Care appealed to the Tax Commission, whose adverse decision was not handed down until February 13, 1996, after the taxes had become "due." Comm-Care paid the taxes under protest the same day and filed its petition for review in the 19th Judicial District Court within thirty (30) days following the Tax Commission's decision. Comm-Care did not pay the taxes by December 31 while its appeal to the Tax Commission was still under advisement, because the Tax Commission would have been divested of jurisdiction. La. R.S. 47:1990 provides:

> "The tax commission may change or correct any and all assessments of property for the purpose of taxation, in order to make the assessments conform to the true and correct valuation, not to exceed its actual cash value. **Such change or correction may be made by the tax commission at any time before the taxes levied have actually been paid." (Emphasis added).**

The defendant assessors filed an exception of prescription to Comm-Care's appeal to the District Court on the grounds that the taxes had not been paid when "due". The trial court maintained the exception, relying on its holding in *Capital Drilling.*[4]

In this case, the district court decided that the word "due" in La. R.S. 47:1998 means that the taxes must be paid by December 31 of the tax year in order that an appeal from an adverse decision of the Tax Commission will lie. It is respectfully submitted, however, that this interpretation renders meaningless the overall scheme of La. R.S. 47:1989-1998 setting forth the process for the contest of assessments administratively. Under the trial Court's interpretation, the Tax Commission need never decide another case, only hold them under advisement past December 31. If the taxpayer pays "timely" the Tax Commission is divested of jurisdiction and the taxpayer is relegated solely to the La. R.S. 47:2110 remedy, a *de novo* suit for refund in the district court. If the taxpayer does not pay "timely," the case is over because its right to appeal under La. R.S. 47:1998 has prescribed.

## B. THE TRIAL COURT ERRED IN READING, LA. R.S. 47:1998 IN *PARI MATERIA* WITH LA. R.S. 47:2110.

The trial court erred in applying this Court's holding in *Comm-Care Corporation v. Louisiana Tax Commission,* a case brought under §2110, to this case brought under §1998.

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[4] *Capital Drilling Company v. Graves,* 496 So.2d 487, (La. App. 1st Cir 1986).

In *Churchill Farms, Inc. v. Louisiana Tax Commission*, 338 So.2d 963 (La. App. 4th Cir. 1976), the Tax Commission asserted that La. R.S. 47:2110 must be read in *pari materia* with La. R.S. 47:1998 to preclude *Churchill* from bringing suit because it had failed to fulfill the prerequisite of filing a sworn list of property and its valuation pursuant to the condition precedent of La. R.S. 47:1998. *Churchill* paid its 1969 taxes under protest in 1971, over one and a half years after the taxes were due, and filed suit within the requisite thirty (30) days. The issue of timely payment was not addressed; however, the suit was allowed and was ultimately successful. The Court of Appeal reasoned that an action under La. R.S. 47:2110 is a separate right, in no way dependant on La. R.S. 47:1998. *Id.* at 965. Thus, the La. R.S. 47:1998 condition precedent of filing a sworn list is not to be read by implication into La. R.S. 47:2110 as a prerequisite to a suit for refund.

By the same token, a condition of La. R.S. 47:2110 cannot be read into La. R.S. 47:1998 as a prerequisite to an appeal of a decision of the Tax Commission. As stated in *Churchill*, the rights of action of La. R.S. 47:1998 and La. R.S. 47:2110 create separate rights of action arising out of separate sets of circumstances not subject to the conditions of prerequisites of each other.

The First Circuit's decision here is contrary to that of the Third Circuit in *Rickey Tri-Key Partnership v. Dupleix*, 462 So.2d 235, 236 (La. App. 3d Cir. 1985), *writ denied*, 464 So.2d 1385 (La. 1985), a §1998 case regarding property assessed for 1982, wherein the taxes were paid in January, 1983 while an appeal was pending before the Tax Commission, following which the Tax Commission affirmed the assess-

ment.[5] The taxpayer appealed to the district court within thirty (30) days of the Commission's decision, but more than (30) days after payment. The defendants excepted on the grounds that the suit was untimely because filed more than thirty days after payment. The Third Circuit held the suit was timely. It stated:

> La. R.S. 47:1998(A) expressly gives appellant the right to a contest an adverse dicision of the Tax Commission in district court within thirty days of that decision. *Rickey*, 462 So.2d at 236.

The Court correctly differentiated between La. R.S. 47:2110, which requires that suit be filed within thirty (30) days of *payment* under protest, and La. R.S. 47:1998, which requires suit be filed within thirty (30) days of the Tax Commission's decision. *Id.* at 236-237. In other words, the Third Circuit concluded that La.R.S. 47:1998 has only one prerequisite the filing of suit within thirty (30) days of the *Tax Commission's decision,* without regard to the date of payment.

Commm-Care filed its petition in this case within thirty (30) days following the Tax Commission's decision, as required by La. R.S. 47:1998. The court of Appeal has imposesd additional prerequisites that are not found in the statute to deny Comm-Care's right to judicial review. Comm-Care satisfied the requirements of La. R.S. 47:1998, and cannot be precluded from seeking judicial review of the tax commission's adverse determination.

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[5] Evidently, the Tax Commission affirmed the assessment under La. R.S. 47:1990 after the taxes were paid.

## C. THE TRIAL COURT ERRED BY MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION IN A §1998 CASE WHEN IT WAS IMPOSSIBLE TO PAY THE TAXES WHEN "DUE" WITHOUT DIVESTING THE TAX COMMISSION OF ITS JURISDICTION.

Under the requirement imposed by the trial court, a taxpayer would be required to pay the tax at issue prior to a decision by the Tax Commission. This cannot have been intended by the legislature because payment during the pendency of the case before the Tax Commission divests the Tax Commission of jurisdiction over the case:

> The tax commission may change or correct any and all assessments of property for the purpose of taxation, in order to make the assessments conform to the true and correct valuation, not to exceed its actual cash value. *Such change or correction may be made by the tax commission at any time before the taxes levied have been paid.* La.R.S. 47:1990 (Emphasis added).

"According to the clear language of La. R.S. 47:1990 quoted above and a long line of previous Attorney General's opinions, it is the opinion of this office that the Louisiana Tax Commission is without authority to change or correct any assessment of property after the taxes levied pursuant to the assessments have actually been paid. "Opinion 77-1475, 1976-77 La. Op. Atty. Gen. 316 (1977).

Thus the Tax Commission only has jurisdiction before the taxes are paid. An examination of the statutes shows that

no payment of taxes during the administrative process is required. To require payment of taxes before a final administrative decision would terminate the administrative process and relegate a taxpayer solely to a post-deprivation remedy.

### D. THE TRIAL COURT ERRED BY DENYING COMM-CARE JUDICIAL REVIEW IN ACCORDANCE WITH LA. R. S. 47:1998 THEREBY DENYING IT DUE PROCESS OF LAW.

Imposition of a tax is a taking of property. Under the Fifth and Fourteenth Amendments to the United States Constitution, the power to tax is legally exerted only if, at some stage, the taxpayer is given an opportunity to contest illegal exactions in keeping with due process principles. *Central of Georgia R. Co. v. Wright,* 207 U.S. 127 (1907); *Mitchell v. M.T. Grant Company* 416 U.S. 600 (1974).

Due process under the Fifth and Fourteenth Amendments require the states to provide a "clear and certain" remedy for aggrieved taxpayers to contest tax assessments. See *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 36-36 (1990), citing *Iowa-Des Moines National Bank v. Bennet,* 284 U.S. 239 (1931); *Montana National Bank of Billings v. Yellowstone County,* 276 U.S. 499 (1928); *Carpenter v. Shaw,* 280 U.S. 363 (1930); *Ward v. Board of County Commissioners of Love County,* 253 U.S. 17 (1920); *Atchison, T. & S.F.R. Co. v. O'Connor,* 223 U.S. 280 (1912). Otherwise an unlawful tax exaction constitutes a deprivation of property without due process of law. A state may provide the requisite procedural safeguards either in the form of pre-deprivation relief, post-deprivation relief or both. *Reich v. Collins,* 115 S.Ct. 547 (1994).

The due process issue presented in this case is whether La.R.S. 47:1998, as interpreted and applied by the trial court, constitutes "clear and certain" pre-deprivation relief.

In *Carpenter v. Shaw*, 280 U.S. 363 (1930), the Choctaw Indian Tribe avoded a distress sale by paying property taxes under protest. The Supreme Court of Oklahoma denied the tribe's right to recover based on a provision of the state statute which allowed a refund suit only if the tax was paid timely.

The Supreme Court reversed its ruling and held that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter* at 369.

The case at hand deals with a claim of exemption under the State's constitution, not a federal law. Nevertheless the holding in *Carpenter* is still applicable. "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of the law." *Brinkerhoff-FarisTrust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930).

"If a taxpayer proves his tax burden is onerous due either to an invalid law or unequal enforcement of a valid levy, the net result is the same and the complaint rises to constitutional magnitude in that there is a deprivation of property without due process of law." *Churchill, supra* at 965.

While the states are free to determine whether to provide a pre-deprivation remedy, a post-deprivation remedy,

or both, the remedy or remedies it does provide must give taxpayers "clear and certain" relief. *Reich v. Collins,* 115 S.Ct. 547, 550-551 (1994). Louisiana provides both remedies: (1) the pre-deprivation administrative proceeding outlined in La.R.S. 47:1989-1998 and (2) the post-deprivation proceeding described in La.R.S. 47:2110.

Comm-Care chose to contest the 1995 assessments pursuant to what on its face is a "clear and certain" pre-deprivation remedy as provided by La.R.S. 47:1989-1998, and it complied with each and every requirement set forth in those sections, only to be told by the Court of Appeal that it had failed to comply with another requirement to be found by reading the statute in *pari materia* with others.[6] This is a clear denial of due process.

In *Reich v. Collins,* 115 S.Ct. 547 (1994), the Court examined the Georgia Supeme Court's application of Georgia's tax refund statute, which provides that "a taxpayer shall be refunded any and all taxes ... which are determined to have been erroneously or illegally assessed ... whether paid voluntarily or involuntarily." On *Reich's* first appeal, the Georgia Supreme Court construed the refund statute not to apply to "the situation where the law under which the taxes (were) assessed and collected is itself subsequently declared to be unconstitutional." On *Reich's* second appeal, the Georgia Supreme Court reasoned (1) that states may choose to provide pre-deprivation or post-deprivation relief and (2) Georgia provided a satisfactory pre-deprivation remedy which *Reich* had failed to follow, therefore it was not a denial of due process to deny *Reich* relief under the State's post-deprivation statute.

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[6] Comm-Care had a right to rely on La.R.S. 47:1989-1998 as written, La. Civil Code Art. 1; *Johnson v. St. Paul Mercury Ins. Co.,* 236 So.2d 216 (La. 1970); Tate, *Louisiana and the Civil Law,* 39 La. L.Rev. 727, 743 (1962).

The United States Supreme Court agreed that the states may provide one remedy or the other or both "so long as that scheme is clear and certain ...(and the state may) reconfigure its remedial scheme over time, to fit its changing needs . . . *but what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course to bait and switch, as some have described it.*" *Reich*, 115 S. Ct. 547 at 550, (emphasis added).

The "bait-and-switch" scheme is exactly the result of the trial court's strained interpretation of the statute. The sequence of sections culminating in La. R.S. 47:1998 is clearly designed by the legislature to provide for pre-deprivation relief. The trial court's interpretation of the statute adds an unwritten requirement and produces the same bait-and-switch result proscribed in *Reich*.

**RULES OF STATUTORY INTERPRETATION:**

According to the rules of statutory construction, "[W]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written." La. Civ. Code Art 9. La. R.S. 47:1998 sets forth the procedure to contest a decision of the Louisiana Tax Commission. Nothing in the statute states that the taxes must be paid within the year for which they are due in order to pursue this remedy.

The legislative intent is to provide taxpayers an opportunity to achieve a resolution before being required to pay. In this context, La. R.S. 47:1998A(1) creates a cause of action for judicial review; it requires only that the petition be filed within thirty (30) days of the Tax Commission's decision. La. R.S. 47:1998A(2) follows almost as an afterthought:

If the taxpayer has filed a suit under A(1) and, as of that point in time, the taxes have fallen due, they shall be paid to the proper officer (to prevent a tax sale) with notice as to the pendency of the suit. This provision is necessary because, unlike the federal system, the legislature chose not to allow the taxes to remain unpaid pending an appeal but to provide instead that if, as of the time the appeal is filed, the taxes have fallen due, they are to be paid with notice of the suit's pendency. This comports with La. R.S. 47:1990, which states that the Tax Commission retains jurisdiction only so long as the taxes remain unpaid.

The statutory rules of construction require that statutes be strictly construed. "A well-established rule of statutory construction is that the courts will not impute meanings to statutes which will lead to absurd results or extend the statutes to situations which the Leglislature never intended should be covered thereby." *Smith v. Town of Vinton*, 25 So. 2d 237, 239 (La. 1946). "A statute should not be construed to defeat its purpose." *Kaufman v. State, through the Department of Public Safety Drivers' License Division*, 286 So.2d 723, 725 (La. App. 1st Cir. 1973).

The rules of construction of tax statutes require that any doubt must be read in favor of the taxpayer. In *Godchaux/Maison Blanche, Inc. v. Broussard*, 590 So.2d 1159 (La. 1991), the Supreme Court wrote: "In interpreting the statutes, we begin from the well-settled premise that taxing statutes must be strictly construed against the taxing authority." *Id.*, p. 1161, citing *Collector of Revenue v. Wells Fargo Leasing Corp.*, 393 So.2d 1244 (La. 1981). "Where a tax statute is susceptible of more than one reasonable interpretation, the construction less onerous to the taxpayer

must be adopted." *Brown v. LaNasa*, 152 So.2d 33, 36 (La. 1963).

As written, La.R.S. 47:1998 does not lead to absurd consequences or conflict with other ad valorem tax provisions. As interpreted by the trial court, it clashes directly with La. R.S. 47:1990 which states that the Tax Commission is divested of jurisdiction if the tax is paid before its decision is reached, which is an absurd result.

## CONCLUSION

La. R.S. 47:1998 was enacted to provide a "clear and meaningful" pre-deprivation remedy. It is clear and unambiguous and not subject to interpretation to read into it timely payment as an additional requirement. For a court to do so constitutes a denial of due process.

Accordingly, it is respectfully submitted that this Court should reverse the decision of the trial court, thereby overruling all exceptions and allowing Comm-Care its day in court on the merits.

Respectfully submitted,

/s/ John A. Stassi II

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

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COMM-CARE CORPORATION

Petitioner,

v.

LOUISIANA TAX COMMISSION, et al.

Respondents.

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ON PETITION OF WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF LOUISIANA

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should this Honorable Court consider a due process issue not pled in the state district court below and not considered by any of the lower courts?

2. Can a state require a taxpayer to pay its taxes timely in order to preserve its right to challenge an assessment?

3. Does an independent legal basis support the lower courts' decisions?

## PARTIES REPRESENTED

This Opposition to Petition for Writ of Certiorari is filed on behalf of the following respondents: Rich Bailey, in his capacity as Assessor of Ouachita Parish; Bobby L. Cudd, in his capacity as Assessor of Beauregard Parish; Gerald McCrory, Jr., in his capacity as Assessor of Ascension Parish; Lee J. Thevenot, in his capacity as Assessor of Avoyelles Parish; Eugene W. Cavanaugh, in his capacity as Assessor of Vernon Parish; Ralph R. Gill, in his capacity as Assessor for Rapides Parish Tax Assessor; Jewette Farley, in his capacity as Assessor of Lincoln Parish; Carmon F. Walker, in his capacity as Assessor of Catahoula Parish; and, Frank Granger III, in his capacity as Assessor of East Baton Rouge Parish.

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**Rules**

U.S.Supreme Court Rule 15.2

## STATEMENT OF THE CASE

During 1995, petitioner, Comm-Care Corporation ("Comm-Care") took action to challenge the legality of 1995 assessments of ad valorem taxes by respondents, the Assessors[1], on ten of Comm-Care's nursing home facilities. This action included a complaint to the local board of review and a subsequent appeal to the Louisiana Tax Commission. No injunction or stay was issued with regard to the December 31, 1995 due date for the payment of the property taxes for 1995.

The Louisiana Tax Commission found on February 13, 1996 that Comm-Care was operating the ten nursing homes "for profit" and that the property was consequently not exempt from ad valorem taxation. On the same day, Comm-Care paid the taxes in question under protest, forty-four (44) days after the

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[1] For convenience, "Assessors" will be used herein to refer collectively to the following respondents: Rich Bailey, in his capacity as Assessor of Ouachita Parish; Bobby L. Cudd, in his capacity as Assessor of Beauregard Parish; Gerald McCrory, Jr., in his capacity as Assessor of Ascension Parish; Lee J. Thevenot, in his capacity as Assessor of Avoyelles Parish; Eugene W. Cavanaugh, in his capacity as Assessor of Vernon Parish; Ralph R. Gill, in his capacity as Assessor for Rapides Parish Tax Assessor; Jewette Farley, in his capacity as Assessor of Lincoln Parish; Carmon F. Walker, in his capacity as Assessor of Catahoula Parish; and, Frank Granger III, in his capacity as Assessor of East Baton Rouge Parish.

taxes were due. On February 27, 1996, Comm-Care filed its petition for judicial review in the state district court. (See Assessors' Appendix, pp. A-17, et seq.).

On October 9, 1996, the state district court sustained an exception of prescription that had been filed on behalf of the Assessors. Comm-Care opposed the Assessors' exception, but did not raise any due process issue. (See Assessors' Appendix, pp. A-35 et seq.). In sustaining the exception of prescription, the state district court held that further review of the decisions of the local board of review and the Louisiana Tax Commission was precluded by Comm-Care's failure to pay its taxes when due on December 31, 1995.

Comm-Care appealed to the Louisiana First Circuit Court of Appeals, which found no error in the judgment of the district court. The state court of appeals declined to decide whether the state district court's judgment was supported by the exception of prescription or instead by an exception of no cause of action that had also been filed by the Assessors. (See Comm-Care's Appendix, pp. A-12 to A-16). Both exceptions were based, at least in part, on Comm-Care's failure to pay its taxes timely. (See Assessors' Appendix, pp. A-25 to A-27, A-28 to A-34). Comm-Care first urged the due process issue to the state court of appeals. (See Petition for Writ of Certiorari

[hereinafter sometimes "U.S. Pet. for Writ"], p. ii ¶1). The state court of appeals did not consider the due process issue. The Louisiana Supreme Court denied Comm-Care's request for a writ of certiorari to the state court of appeals and also did not consider the due process issue. (U.S. Pet. for Writ, p.ii ¶2).

Comm-Care's Statement of the Case contains a discussion of Louisiana jurisprudence which the Assessors believe should have instead been included in the Argument portion of the Petition for Writ of Certiorari. In an effort to comply with U.S. Supreme Court Rule 15.2, the Assessors respectfully show that Comm-Care's Statement of the Case mischaracterizes the current status of Louisiana jurisprudence. The Louisiana Supreme Court granted writs of certiorari as to the conflicting opinions of two state courts of appeals referred to by Comm-Care[2] and the conflict was resolved in Comm-Care Corp. v. Bishop, 696 So.2d 969 (La. 7/1/97), *reh'g granted* Comm-Care Corp. v. Bishop, 706 So.2d 425 (La. 1/21/98). The initial opinion of the Louisiana Supreme Court followed the reasoning of the First Circuit Court of Appeals in

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[2] See Comm-Care Corp. v. Louisiana Tax Commission, 681 So.2d 1001 (La.App. 1 Cir, 9/27/96), and Comm-Care Corp. v. Bishop, 673 So.2d 212 (La.App. 3 Cir. 3/6/96). These cases were discussed by Comm-Care at pages 3 and 5 of its Petition for Writ of Certiorari.

holding against Comm-Care. Comm-Care Corp. v. Bishop, 696 So.2d at 974. On rehearing, the Louisiana Supreme Court held that the issue discussed in its original opinion was moot, but held that a different legal basis supported the same result.

## ARGUMENT

Comm-Care's Petition for Writ of Certiorari is simply an attempt to rectify its failure to avail itself of the clear and certain remedy provided to aggrieved taxpayers by Louisiana law.

### I. The Due Process Issue Was Not Timely Raised.

A constitutional issue not properly raised in or passed on by the lower courts should not be considered by this Honorable Court. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Adler v. New York Bd. of Educ., 342 U.S. 485, 496 (1952); Korematsu v. U.S., 323 U.S. 214, 222 (1944). Federal law and Louisiana law presume that statutes are constitutional. Arizonans for Official English v. Ariz., 520 U.S. 43 (1997); Chamberlain v. DOTD, 624 So.2d 874, 879 (La. 1993); Moore v. RLCC Tech., Inc., 668 So.2d 1135, 1140 (La. 2/28/96). A party challenging the validity of a statute on constitutional grounds in Louisiana has the burden of proving its

invalidity. Moore v. Roemer, 567 So.2d 75, 78 (La. 1990). This burden requires that the challenging party file a plea of unconstitutionality in the trial court and outline with particularity the basis of the purported unconstitutionality. Williams v. Dept. of Health & Hosp., 671 So.2d 899, 901-2 (La. 1/20/96).

No plea of unconstitutionality was filed in the state district court by Comm-Care in this matter.[3] While Comm-Care attempted to raise the due process issue in its brief to the state court of appeals, the court did not pass on the merits of the due process issue.[4] The Louisiana Supreme Court also did not consider the due process issue.[5]

Since the district court pleadings contain no plea of unconstitutionality and since the intermediate courts did not consider the due process issue now asserted by Comm-Care, this issue has not been properly placed before this Honorable Court. Accordingly, Comm-Care's Petition for Writ of Certiorari should be denied.

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[3] See U.S. Pet. for Writ, p. ii; See also Assessors' Appendix at pp. A-17, et seq., and pp. A-35, et seq.

[4] See Comm-Care's Appendix at pp. A-49 to A-52, pp. A-12 to A-16; and see U.S. Pet. for Writ, at p. ii, ¶1.

[5] See Comm-Care's Appendix at p. A-17; and see U.S. Pet. for Writ, at pp. ii, ¶2.

## II. Any Required Due Process Was Afforded to Comm-Care.

### A. U.S. Constitutional Due Process Requirements Are Flexible And May Be Satisfied By Pre-deprivation or Post-deprivation Remedies.

States are allowed to require a taxpayer to promptly pay a tax when due. The Due Process Clause of the Fourteenth Amendment of the United States Constitution simply obligates such a state to provide meaningful post-deprivation relief to remedy any unconstitutional tax collected. McKesson v. Div. of Alc. Bev., 496 U.S. 18, 39 (1990).

In non-tax contexts, the Due Process Clause requires relief prior to any deprivation of property. Id., 496 U.S. at 37, *citing* Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 542 (1985). In the exaction of taxes, however, it is well-established that a pre-deprivation remedy is not required. McKesson, 496 U.S. at 37. Instead, the requirements of the Due Process Clause may also be satisfied by a post-deprivation remedy. A post-deprivation remedy which requires the timely payment of taxes is allowed because of the government's "exceedingly strong interest in financial stability". Id.

Due process is a flexible concept and its procedural requirements depend

upon the demands of each particular situation. Matthews v. Eldridge, 424 U.S. 319, 334 (1976), *and cases cited therein*. Louisiana's procedure for challenging the legality of an assessment affords taxpayers notice and a meaningful opportunity to be heard that is more than adequate under the circumstances.

### B. Louisiana Has Two Procedures for Challenges to Assessments.

#### 1. Louisiana distinguishes between "Legality" and "Correctness" challenges.

Louisiana constitutional and statutory law provides for two distinct procedures for challenging an ad valorem tax assessment. The applicability of each procedure in a particular case depends upon the nature of the challenge asserted by the taxpayer.

Louisiana courts recognize a distinction between "correctness" and "legality" challenges. Triangle Marine, Inc. v. Savoie, 681 So.2d 937, 939-40 (La. 10/15/96). Correctness challenges are those seeking adjustments to the valuation of taxable property. Id. at 940.[6] In contrast, legality challenges are directed at claims that the

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[6] See also Abraham v. Carter, 580 So.2d 485, 487 (La.App. 4 Cir. 1991); Westminster Mgmt. Corp. v. Mitchell, 525 So.2d 1171 (La.App. 4 Cir. 1988), *cert. denied* 489 U.S. 1018 (1989); Lowrey Chevrolet, Inc. v. Brumley, 510 So.2d 1294 (La.App. 3 Cir. 1987).

assessment is void or inherently invalid. Id. A challenge to the validity of a tax on exempt property is a legality challenge, not a correctness challenge. Id.

A correctness challenge to an assessment must follow the procedure contained in Louisiana Revised Statutes § 47:1989-1998. Triangle Marine, 681 So.2d at 939-40.[7] The pre-deprivation remedy created by these statutes includes administrative[8] procedures and judicial review[9] mandated by La. Const. art. 7, § 18(E).[10]

On the other hand, legality challenges are properly made pursuant to Louisiana Revised Statute § 47:2110,[11] a post-deprivation remedy. Triangle Marine, 681 So.2d at 941, *and cases cited therein*. In the present case, Comm-Care erroneously pursued the pre-deprivation administrative procedures provided for in R.S. § 47:1989-1998 for correctness challenges only. The Assessors excepted to the use of the improper procedure in state district court. (See Assessors' Appendix, p. A-26 ¶2, p. A-27 ¶4). The Assessors repeated their opposition to the use of the improper procedure in both appellate

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[7] See also Abraham, 580 So.2d at 487.

[8] La.R.S. § 47:1989, 1992 & 1997. See Assessors' Appendix at pp. A-3 to A-4, A-14.

[9] La.R.S. § 47:1998. See Comm-Care's Appendix at pp. A-29 to A-31 for the text of this statute.

[10] See Assessors' Appendix at p. A-1.

[11] See Comm-Care's Appendix at pp. A-18 to A-20 for the text of La.R.S. § 2110.

courts. (See Assessors' Appendix, pp. A-50, A-72 to A-73). Because a challenge to the validity of a tax on exempt property is a legality challenge, the proper procedure would have been the post-deprivation procedure contained in R.S. § 47:2110.[12]

**2. Comm-Care failed to comply with either Louisiana procedure.**

Ad valorem taxes are due in Louisiana on December 31. La.R.S. § 47:2101.A.(1).[13] The filing of a challenge to an assessment does not delay the December 31 due date. In fact, R.S. § 47:2110.A provides, in part, that "[n]o court of this state shall issue any process whatsoever to restrain the collection of an ad valorem tax. . .".[14] Thus, a challenge to an assessment cannot alleviate the necessity of the payment of taxes by December 31.

Louisiana R.S. § 47:2110 requires that a taxpayer pay, under protest, the taxes due by December 31 and then institute an action to recover said taxes in a district court within thirty

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[12] For the prior tax year, Comm-Care had attempted to pursue a remedy under R.S. § 47:2110, but failed to state a cause of action under that statute. Comm-Care Corp. v. Bishop, 706 So.2d 425, 427 (La. 1/21/98). It is not clear why this procedure was abandoned by Comm-Care for the 1995 tax year.

[13] See Comm-Care's Appendix at p. A-21.

[14] See Comm-Care's Appendix at p. A-18.

(30) days of payment. Capital Drilling Co. v. Graves, 496 So.2d 487, 491 (La.App. 1 Cir. 1986).[15] The court in Capital Drilling opined that a challenge to an assessment pursuant to R.S. § 47:1998 would also be contingent upon the timely payment of taxes under protest. Capital Drilling, 496 So.2d at 492.

Comm-Care argued in the lower courts that it could not pay its taxes timely without divesting the Louisiana Tax Commission of jurisdiction.[16] While this argument has apparently been abandoned, it ignored the fact that the proper procedure for Comm-Care's legality challenge was under R.S. § 47:2110, not §§ 47:1989-1998. Further, a Louisiana court of appeals has held that a taxpayer who properly initiated a correctness challenge under R.S. §§ 47:1989, *et seq.*, was not foreclosed from continuing under those procedural statutes because it paid its taxes when due. Rickey Tri-Key Partnership v. Dupleix, 462 So.2d 235, 237 (La.App. 3 Cir. 1984).

Public policy strongly supports the requirement of timely payment of taxes

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[15] As to Comm-Care's 1994 taxes, the Louisiana Supreme Court followed Capital Drilling in its original opinion in Comm-Care v. Bishop, 696 So.2d at 974, before deciding on rehearing that those consolidated cases should be dismissed on a different basis in Comm-Care v. Bishop, 706 So.2d 425.

[16] See Comm-Care's Appendix at pp. A-48 to A-49, A-75.

to preserve the right to litigate the validity of a tax in court. Id. This Honorable Court has recognized that "[a]llowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls . . . and by making the ultimate collection of validly imposed taxes more difficult." McKesson, 496 U.S. at 37; See also Atchison, Topeka & Santa Fe R. Co. v. O'Connor, 223 U.S. 280 (1912).

Taxes owed for the 1995 tax year were not paid by Comm-Care until February 13, 1996, forty four (44) days after they had become delinquent. The state district court correctly held below that Comm-Care's petition for judicial review was untimely because the taxes were not paid when due.[17] The failure to pay the taxes when due precluded any possibility of compliance with R.S. § 47:1998 or R.S. § 47:2110. Thus, while Comm-Care's legality challenge to the assessment should have been brought under R.S. § 47:2110, the use of an improper procedure is immaterial because its failure to pay the ad valorem taxes when due would be fatal to any challenge to an assessment. Comm-Care did have the *opportunity* to avail itself of a clear and certain remedy.

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[17] See Comm-Care's Appendix at pp. A-10 to A-11.

### 3. Comm-Care Was Afforded Adequate Notice And A Meaningful Opportunity To Be Heard.

Louisiana's procedure for challenging the legality of an assessment pursuant to R.S. § 47:2110 provides a clear and certain remedy which comports with the requirements of due process. An action for this remedy may be brought within thirty days of the timely payment of taxes. This procedure was clear, certain, fair and available to Comm-Care in the present matter. Nonetheless, even though Comm-Care was familiar with the procedure provided by R.S. § 47:2110, Comm-Care chose not to employ this procedure as to its 1995 taxes.[18]

Furthermore, Comm-Care was actually given a hearing on their claim to the ad valorem tax exemption for 1995 before the Louisiana Tax Commission. While intended for correctness challenges only, this procedure and the judicial review provided for in R.S. § 47:1998 afforded Comm-Care a sufficient notice and opportunity to be heard. However, Comm-Care chose not to follow the requirements of the procedure for judicial review of the administrative procedures by refusing to pay its taxes when due.

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[18] Comm-Care had previously attempted to utilize the procedure provided for in R.S. § 47:2110 as to taxes for a prior year.

Like many states, Louisiana requires the timely payment of taxes to preserve the right to litigate a challenge to an assessment.[19] Comm-Care essentially argues that it was denied due process because it did not know that it was required to pay the ad valorem taxes by December 31. Comm-Care should not be excused from complying with the law because of its ignorance of the law. La.C.C. art. 5.[20] Thus, Comm-Care's failure to employ the proper procedure for challenging the legality of an assessment and its failure to pay its taxes on time are fatal to its claim.

Although Comm-Care has now asserted that it cannot be required to follow statutory requirements derived from interpreting R.S. § 47:1998 *in para materia* with other statutes, Comm-Care itself must have so interpreted R.S. § 47:1998 since Comm-Care's own petition for judicial review prays for relief pursuant to R.S. § 47:2110.A.[21] (See Assessors' Appendix, p. A-23). Comm-Care's argument is without merit.

The cases discussed by Comm-Care in its petition for writ do not support its position. The tax exacted in Carpenter v. Shaw, 280 U.S. 363 (1930), was in direct contravention of an agreement

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[19] See Capital Drilling, 496 So.2d at 491.

[20] "No one may avail himself of ignorance of the law." La.C.C. art. 5.

[21] Comm-Care's Petition for Judicial Review also expressly alleges that its claim is made pursuant to La.R.S. § 47:1998.A(1).

between the Choctaw Indian tribe and the federal government. The Choctaw had been compelled to pay an illegal tax under duress. Id. at 369. This Honorable court held therein that a state court could not deny the recovery of taxes which violated U.S. law or the U.S. Constitution. Id. The result would certainly be different where, as here, the tax does not violate U.S. law or the U.S. Constitution.

Similarly, the tax exacted in Reich v. Collins, 513 U.S. 106 (1994), violated the U.S. Constitution and, as in Carpenter, the state court had attempted to deny recovery of a tax which violated the laws or Constitution of the United States. Further, the "bait and switch" performed by Georgia in Reich does not exist in the present case. In Reich, the taxpayer paid the illegal taxes at a time when Georgia had what appeared to be a clear and certain post-deprivation remedy. The Georgia Supreme Court decided that this post-deprivation remedy did not exist as to the Reich taxpayer only after the taxes had been paid. The Georgia Supreme Court also held that Georgia's pre-deprivation procedures were constitutionally adequate, although the taxpayer in Reich could not utilize those procedures. As a consequence, the Reich taxpayer did not have a real opportunity to avail himself of the pre-deprivation procedure because the post-deprivation remedy appeared to exist

until it was too late for the taxpayer to use the pre-deprivation procedure. Id.

Comm-Care failed to identify any "bait" and any "switch" in the present matter. In fact, the two remedies available in Louisiana, particularly the one provided for legality challenges[22], provided a clear and certain remedy before December 31, 1995 and they continue to provide a clear and certain remedy today. Nonetheless, Comm-Care refused to follow either procedure. Comm-Care's Petition for Writ of Certiorari should be denied

## III. The Lower Court's Decisions Are Supported By An Independent Legal Basis.

Constitutional questions should not be decided until necessary. Clinton v. Jones, 520 U.S. 681 (1997). This Honorable Court recognizes the "fundamental and long-standing principle of judicial restraint". Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 445-6 (1988). Judicial restraint and the avoidance of constitutional questions are particularly appropriate in "takings" cases. Pennell v. San Jose, 485 U.S. 1, 10 (1987). It should always be determined whether a statute can be reasonably construed so as to avoid the

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[22] La.R.S. § 47:2110.

constitutional question. Feltner v. Columbia Pictures Television, Inc., ____ U.S. _____, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998).

The principle of judicial restraint dictates that the decision of the lower courts in this matter remain undisturbed. The state court of appeals found no error in the state district court's judgment, but declined to decide whether the result should have been granted on the exception of prescription or the exception for failure to state a cause or right of action.[23] The Assessors contend that the exception of prescription was properly sustained by the state district court and that their exception of no cause of action was also a proper, independent basis for the action of the lower courts.

The Louisiana Code of Civil Procedure sets forth a system of fact pleading. La.C.C.P. arts. 854, 891, 1003, 1004[24]; Roberson v. Provident House, 576 So.2d 992, 994 (La. 1991). In order to state a cause of action, a petition must contain allegations of specific facts sufficient to support the claim. Lott v. Haley, 370 So.2d 521, 524-5 (La. 1979).

No cause of action can be stated in Louisiana on the basis of the unconstitutionality of a statute as applied in a particular case unless

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[23] Cite Comm-Care's Appendix at A-16.

[24] See Assessors' Appendix at pp. A-1 to A-2.

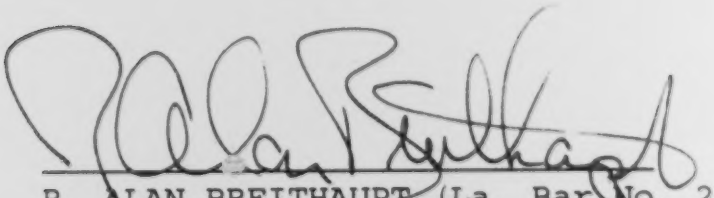
there is a plea specifying how the statute is unconstitutional. Williams v. Dept. of Health & Hospitals, 671 So.2d at 901-2. Likewise, an aggrieved taxpayer must allege facts sufficient to show compliance with any legal prerequisites to a suit to recover taxes. Williams v. Louisiana, 538 So.2d 193, 198 (La. 1989). As explained hereinabove, the appropriate procedure for Comm-Care's challenge to the legality of an assessment is provided for by R.S. § 47:2110, which requires payment of taxes by December 31. Comm-Care's petition for judicial review affirmatively alleges that it was seeking review pursuant to the wrong statute, i.e., R.S. § 47:1998. (See Assessors' Appendix, p. A-18 ¶1). Further, said petition does not contain any allegation that its taxes were paid on time as R.S. § 47:2110 and R.S. § 47:1998 both require. Thus, Comm-Care stated no cause of action.

Additionally, the failure to plead any constitutionality or due process issue is yet another basis for sustaining the no cause exception. Comm-Care now argues that the Louisiana courts' interpretation of Louisiana law violates due process, but this argument was not made timely below. Consequently, Comm-Care has stated no cause of action which might otherwise exist because the purported due process issue was not pled in the state court. Thus, an independent legal basis for the

decision of the lower courts exists and the due process issue has not been properly placed before this Honorable Court.

**CONCLUSION**

Petitioner did not timely raise the due process issue. This issue was not pled in the state district court and was not considered by either of the intermediate courts. Further, the procedure of which petitioner complains does provide taxpayers with a clear and certain remedy for any unlawful tax collected. Finally, an independent legal basis supports the decisions of the lower courts. Therefore, the Petition for Writ of Certiorari should be denied.



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Supreme Court, U.S.
FILED
OCT 22 1998
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No. 98-480

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

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COMM-CARE CORPORATION

Petitioner,

v.

LOUISIANA TAX COMMISSION, et al.

Respondents.

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ON PETITION OF WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF LOUISIANA

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# APPENDIX OF RESPONDENTS

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## PARTIES REPRESENTED

This Appendix in support of the Opposition to Petition for Writ of Certiorari is filed on behalf of the following respondents: Rich Bailey, in his capacity as Assessor of Ouachita Parish; Bobby L. Cudd, in his capacity as Assessor of Beauregard Parish; Gerald McCrory, Jr., in his capacity as Assessor of Ascension Parish; Lee J. Thevenot, in his capacity as Assessor of Avoyelles Parish; Eugene W. Cavanaugh, in his capacity as Assessor of Vernon Parish; Ralph R. Gill, in his capacity as Assessor for Rapides Parish Tax Assessor; Jewette Farley, in his capacity as Assessor of Lincoln Parish; Carmon F. Walker, in his capacity as Assessor of Catahoula Parish; and, Frank Granger III, in his capacity as Assessor of East Baton Rouge Parish.

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## APPENDIX

**§ 18. Ad Valorem Taxes**

(E) Review. The correctness of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all in accordance with procedures established by law.

**Art. 854 Form of Pleading**

No technical forms of pleading are required.

All allegations of fact of the petition, exceptions, or answer shall be simple, concise, and direct, and shall be set forth in numbered paragraphs. As far as practicable, the contents of each paragraph shall be limited to a single set of circumstances.

**Art. 891 Form of petition**

A. The petition shall comply with Articles 853, 854, and 863, and, whenever applicable, with Articles 855 through 861. It shall set forth the name, surname, and domicile of the parties; shall contain a short, clear, and concise statement of all causes of action arising out of, and of the material facts of, the transaction or occurrence that is the subject matter of the litigation; shall designate an address, not a post office box, for receipt of service of all items

involving the litigation; and shall conclude with a prayer for judgment for the relief sought. Relief may be prayed for in the alternative.

* * *

**Art. 1003 Form of answer**

The answer shall comply with Articles 853, 854, and 863 and, whenever applicable, with Articles 855 through 861. It shall admit or deny the allegations of the petition as required by Article 1004, state in short and concise terms the material facts upon which the defenses to the action asserted are based, and shall set for the all affirmative defenses as required by Article 1005. It shall also contain a prayer for the relief sought. Relief may be prayed for in the alternative.

**Art. 1004 Denials**

The answer shall admit or deny the allegations of fact contained in each paragraph of the petition, and all such allegations, other than those as to the amount of damages, are admitted if not denied in the answer. If the defendant is without knowledge or information sufficient to justify a belief as to the truth of an allegation of fact made in the petition, he shall so state and this shall have the effect of a denial. Denials shall fairly meet the substance of the allegations denied. When the defendant intends in good faith to deny

only a part of or to qualify an allegation of fact, he shall admit so much of it as is true and material and shall deny or qualify the remainder.

**§ 1989. Review of appeals by tax commission**

A. Within ten days of receipt of the assessment lists as certified by the local board of review, the tax commission shall conduct public hearings to hear appeals of taxpayers, bona fide representatives of an affected tax-recipient body, or assessors from the action of the board of review.

B. The tax commission shall consider the appeal of any taxpayer, bona fide representative of an affected tax-recipient body, or assessor dissatisfied with the determination of a local board of review and may affirm, reverse, or modify the contested determination of that board of review.

C. All such hearings shall be conducted in accordance with the rules and regulations established by the tax commission.

D. All decisions by the tax commission are final unless appealed to the district court within thirty days.

E. The assessment lists, together with any changes in connection therewith, shall be certified and returned to each assessor on or before October 15 of each year.

**§ 1992. Inspection of assessment lists; notification and review of assessments by board of review; hearing officers**

A. (1) After each assessor has prepared and made up the lists showing the assessment of immovable and movable property in and for his parish or district, his lists shall be exposed daily for inspection by the taxpayers and other interested persons for the period provided for in Subsection G of this Section. Each assessor shall give notice of such exposure for inspection in accordance with rules and regulations established by the Louisiana Tax Commission.

(2) A property owner or authorized agent of the property owner may make a written request for notice of the current year's assessment of the property of which he is the owner; however, such request shall be made no sooner than the first day of June of that year, and such request shall be received by the assessor of the parish or district in which the property is located no later than June fifteenth of that same year. The authorized agent of the taxpayer shall provide with the request for the assessment, written authorization from the taxpayer for that agent to act as the authorized agent of the taxpayer in the request of the notice of an assessment. The property owner shall provide to the assessor at

the time of the mailing of the notice, appropriate means for the return of the notice such as a self-addressed envelope of sufficient size and adequate postage to hold the notice requested. The assessor, at not cost to him, shall deliver to the property owner through the means provided by the property owner a written notice of the assessed value of the property no later than the close of business on the third day for inspection of the assessment lists as provided for in Subsections F and G of this Section. However, the failure to provide the written notice provided in this Paragraph shall not result in any extension of time for an appeal of assessment.

B. After the lists of each assessor have been exposed for inspection for the period provided for in Subsection G of this Section. Each assessor shall give notice of such exposure for inspection in accordance with rules and regulations established by the Louisiana Tax Commission.

C. The board of review shall consider the written or oral complaint of any person desiring to be heard who has timely filed the report or reports as required by Chapter 6 of Subtitle III of Title 47, R.S. 47:2301 et seq., and who has provided to the board of review at least seven days prior notice either through appearing in person at the board of review's office or by filing such

complaint by certified mail. Contrary provisions of law notwithstanding, the written or oral complaint of any bona fide representative of an affected tax recipient body shall be considered by the board of review provided such representative has provided seven days prior notice to the board in the manner provided in this Section and has furnished the owner's name and address, a description of each property contested, and the assessment number of each property contested; nothing contained herein shall be construed to authorize a tax recipient body to challenge the assessment of all property within its taxing jurisdiction in a single complaint. The validity of each assessment shall be determined on its own merits using recognized appraisal techniques. The board of review may make a determination to increase or decrease the assessment of immovable or movable property made by the assessor in accordance with the fair market or use valuation determined by the board.

D. All determinations by the board of review shall be final unless appealed to the tax commission. Any taxpayer or assessor dissatisfied with the determination of the board of review may appeal to the tax commission in accordance with rules and regulations established but the tax commission.

E. On the fifteenth day after the board of review shall have commenced the

public hearings as provided herein, the assessment lists, together with any changes in connection therewith, shall be certified and sent to the tax commission within three days.

F. In Orleans Parish, the procedure for review of assessments shall be as follows:

(1) Each assessor shall prepare and make up the lists showing the assessment of immovable and movable property in and for his district; the lists shall be exposed daily, except Saturday, Sunday, and legal holidays for inspection by the taxpayers and other interested persons during the period August first through August fifteenth of each year unless August fifteenth falls on a weekend or a legal holiday, when the period shall extend until the next business day. Each assessor shall give notice of such exposure for inspection in accordance with rules and regulations established by the Louisiana Tax Commission. On or before the tenth business day after August fifteenth, the assessors shall certify their rolls to the board of review.

(2) The board of review shall consider all written complaints which have been filed in compliance with the following procedure:

(a) The complaint form provided by the board, through the office of the assessor, must be completed in

conformity with the requirements of the board of review.

(b) The complaint form must be received in the assessor's office within three business days after August fifteenth.

(c) The form must be forwarded by the assessor and received by the board of review within seven business days after August fifteenth.

(d) The taxpayer must have timely filed the reports as required by R.S. 47:2301 et seq. and R.S. 47:2321 et seq.

(3) The board of review shall convene hearings on or before September fifteenth. The board may create one or more hearing officers, any one of whom shall be a member of the board of review and who may conduct all required public hearings of the board with or without the presence of the other members, provided that no final action may be taken by such board of review unless quorum is present. The board may make a determination to increase or decrease the assessment of real or personal property made by the assessor in accordance with the fair market or use valuation determined by the board.

(4) The board of review shall certify the assessment list to the Louisiana Tax Commission on or before October twentieth of each year.

**§ 1993. Preparation and filing of rolls by assessor**

A. (1) As soon as the assessment lists have been approved by the parish governing authorities as boards of reviewers, the assessors shall prepare the assessment rolls in triplicate after which one copy shall be delivered to the tax collector, one copy to the Louisiana Tax Commission, one copy to the recorder of mortgages, and two copies of the grand recapitulation sheet to the legislative auditor.

(2) If an assessor uses electronic date processing equipment to prepare the assessment rolls, the assessment data produced shall be made available upon request in a useable electronic media.

(3) The assessors shall prepare said rolls by parish, school board, police jury, levee district, special district and by any other recipients of ad valorem taxes, except by municipality. If any municipality requests such a roll, the assessor shall be required to prepare such a roll; however, the assessor's salary and expense fund shall be reimbursed by the municipality in accordance with R.S. 47:1993.1(c).

(4) If any municipality prepares its own tax rolls and assessment lists, upon approval of these rolls and/or lists by the parish governing authorities as boards of reviewers, each municipality shall prepare and submit to the Louisiana Tax Commission and the

legislative auditor an annual statement of its millage rates and assessed valuation of property within its respective jurisdiction.

B. The assessors of the parishes of this state shall not file and deposit with the tax collector of their respective parishes the assessment rolls of any current year until the collector shall present a receipt or quietus from the auditor and the parish governing authority that all state and parish taxes assessed on the rolls of the preceding year have been paid or accounted for. If the tax collector is unable to present this receipt or quietus, the assessor shall immediately notify the auditor, the governing authority, and the supervisor of public accounts of his completion of the assessment rolls of his parish and of his inability to file them by reason of the tax collector not having obtained the required quietus. Any assessor who shall violate the provisions of this Paragraph shall forfeit any and all commissions to which he may be entitled from parish or state for his labors in making and writing the assessment rolls.

C. The assessors shall secure the approval of the tax commission before filing their assessment rolls with the tax collector, and the tax commission may instruct all tax collectors not to receive from the assessor any assessment roll or collect any taxes thereon

without the written consent of the tax commission. The tax commission may require the assessors to take an oath in a form to be prescribed by the tax commission declaring that he has complied with its instructions.

D. Each tax assessor, parish of Orleans excepted, shall complete and file the tax roll of his parish on or before the 15th day of November in each calendar year. The officer having custody of the assessor's salary and expense fund shall withhold from the assessor's salary five dollars ($5.00) for each day of delay in the filing of the roll after such date.

E. Filing in the recorder's office shall be full notice to each taxpayer, and to each other person whom it may in any manner concern, that the listing, assessment, and valuation of the taxable property has been completed, that the rolls are on file in the sheriff's or tax collector's office and in the office where the mortgage records are kept and that the taxes are due and collectible, as provided by law.

F. The act of depositing the rolls by the assessor in the office where the records of the parish are kept, shall be deemed prima facie evidence that the assessment has been made and completed in the manner provided by law. No injunction shall be issued by any court to prevent any assessor from depositing the rolls. In the suit of any taxpayer

testing the correctness of his or their assessments before any court of competent jurisdiction, the decision of such shall only affect the assessment of the person or persons in such suit, and shall in no manner affect or invalidate the assessment of any other person or property appearing upon the tax rolls.

G. From the day the roll is filed in the recorder's office, it shall act as an lien upon each specific piece of real estate thereon assessed, which shall be subject to a legal mortgage after the thirty-first day of December of the current year for the payment of the tax due on it, but not for any other tax, which mortgages shall prime and outrank all other mortgages, privileges, liens, encumbrances or preferences, except tax rolls of previous years.

H. The recorder of mortgages shall keep the roll delivered to him among the record books of his office, and it shall be a part of the record of such office. He shall index the tax roll in the current mortgage book under the head of "tax roll" and no further record thereof shall be necessary; however, the failure of the recorder of mortgages to mark the tax rolls "filed" or to index them shall in no way prejudice the rights of the state or any parish or municipal corporation.

**§ 1993.1 Additional duties of assessors; deposit of funds; reimbursement of costs by municipalities**

A. The requirements of R.S. 47:1957(A) shall be deemed to be additional duties and obligations of the various assessors' offices.

B. Any funds received from any municipality for reimbursement of costs incurred by the assessor in the preparation of any listings and/or rolls shall be deposited into the assessor's salary and expense fund and shall not constitute additional income or salary to the assessor.

C. If any municipality requests a listing or roll of the assessor, the assessor shall be entitled to demand and receive from such municipality reimbursement to the assessor's salary and expense fund in an amount not to exceed one dollar per listing for the first five thousand listings. For each listing greater than five thousand, there shall be an additional reimbursement not to exceed fifty cents per listing. However, in each parish the assessor may be entitled to a reimbursement to the assessor's salary and expense fund, in an amount to be determined by the assessor but in no case to exceed the provisions of this Subsection.

**§ 1997. Filing of rolls, payment of taxes, and sale of property for delinquent taxes; Orleans parish**

A. Beginning with the year 1963, on or before the fifteenth day of October of each year, copies of the rolls showing the final assessment of real and personal property shall be sent to the city and state tax collector for the parish of Orleans, the state comptroller, the recorder of mortgages for the parish of Orleans and the director of finance of the city of New Orleans. The collection of taxes shall begin on the first day of January of the year for which such taxes are levied. Said taxes may be paid in two equal installments payable, respectively, in January and May of each year beginning with the year 1964; provided that the taxpayer shall pay one-half of said taxes during the month of January. Unless the taxpayer during the month of January shall pay all real estate, personal, and public utilities taxes on property owned by him in the parish of Orleans or one-half thereof, as hereinabove provided, the entire amount of such taxes shall become delinquent on the first day of February and said taxed shall bear ten per cent per annum delinquent penalty from the date of delinquency until paid. If a second installment is elected as hereinabove provided it shall be

delinquent on the last day of May and shall bear the ten per cent per annum delinquent penalty from the date of delinquency until paid. On the thirty-first day of December of each year, commencing with December 31, 1963, the director of finance of the city of New Orleans, under such regulations as may be prescribed by the city council, shall forthwith proceed to advertise and sell for delinquent taxed the real estate and public utilities upon which taxes are delinquent and shall proceed to enforce the collection of delinquent property taxes. The proceedings by the director of finance for the enforcement of the payment of delinquent real estate, personal property, and public utilities taxes shall be in the manner and form as now provided by law.

B. Beginning with the year 1971, on or before the fifteenth day of October of each year, copies of the rolls showing the final assessment of real and personal property shall be sent to the city and state tax collector for the parish of Orleans, the state comptroller, the recorder of mortgages for the parish of Orleans and the director of finance for the city of New Orleans. The collection of taxes shall begin on the first day of January of the year 1972, and for each year thereafter, for which such taxes are levied. Beginning with the year 1972, the entire amount of such taxes shall become

delinquent on the first day of February and said taxes shall bear ten percent per annum delinquent penalty from the date of delinquency until paid. On the thirty-first day of December of each year, commencing with December 31, 1972, the director of finance of the city of New Orleans, under such regulations, as may be prescribed by the city council, shall forthwith proceed to advertise and sell for delinquent taxes the real estate and public utilities upon which taxes are delinquent and shall also proceed to enforce the collection of delinquent personal property taxes. The proceedings by the director of finance for the enforcement of the payment of delinquent real estate, personal property, and public utilities taxes shall be in the manner and form as now provided by law.

19TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
NUMBER: 425,365 DIVISION " M"

COMM-CARE CORPORATION
VERSUS

LOUISIANA TAX COMMISSION, and
LEE J. THEVENOT, in his capacity as assessor for the PARISH OF AVOYELLES; JEWETTE FARLEY, in her capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER, in his capacity as capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION' EUGENE CAVANAUGH, in his capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES PARISH; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA, RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and
JOE TORN TRUNZLER, in his capacity as Sheriff and Ex-Officio Tax collector of the PARISH OF CATAHOULA; WILLIE WAYNE HOUCK, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF LINCOLN; WILLIAM EARL HILTON, in his

capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF RAPIDES; FRANK A. HOWARD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF VERNON; HAROLD L. TRIDICO, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF ASCENSION; WILLIAM BELT, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF AVOYELLES; M. BOLIVAR BISHOP, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF BEAUREGARD; ELMER LITCHFIELD, in his capacity as Sheriff and Ex-Officio Tax Collector for the PARISH OF EAST BATON ROUGE; LAYMON GODWIN, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF OUACHITA

FILED:_____ _____

DEPUTY CLERK

PETITION FOR JUDICIAL REVIEW

The Petition for Judicial Review of Comm-"Care Corporation, ("Petitioner"), with respect represents:

1.

This petition is brought pursuant to La. R.S. 47:1998A(1) to review a decision of the Louisiana Tax Commission (the "Commission") rendered February 13, 1996. A copy of the Commission's decision is attached as Exhibit 1 and pleaded fully herein.

2.

The Commission is a public body, and is made defendant herein pursuant to La. R.S. 47:1989(D) and 1998A(1) as this is an appeal from a decision of the Commission adverse to Petitioner relative to 1995 ad valorem taxes, penalties and interest (the "taxes") assessed against the facilities described in paragraph 7 hereinbelow.

3.

Lee J. Thevenot, Jewette Farley, Roy D. Miller, Gerald McCrory, Jr., Eugene Cavanaugh, Frank Grander, III, Ralph Gill, Carmon Walker, and Rich Bailey (the "Assessors") are the duly elected and commissioned assessors, respectively, of the Parishes of Avoyelles, Lincoln, Beauregard, Ascension, Vernon, Baton Rouge, Rapides, Catahoula, and Ouachita, who assessed the taxes, and are made defendants herein in their official capacities as necessary parties defendant, as their interests may appear.

4.

Defendants, Joe Torn Trunzler, Willie Wayne Houck, William Earl Hilton, Frank A. Howard, Harold L. Tridico, William Belt, M. Bolivar Bishop, Elmer Litchfield, Laymon Godwin (the"Sheriffs") are the duly elected and commissioned Sheriffs and Ex-Officio Tax Collectors, respectively, of the Parishes of Catahoula, Lincoln, Rapides, Vernon, Ascension, Avoyelles, Beauregard, East Baton Rouge, and

Ouachita, to whom Petitioner paid all of the Taxes under protest, and are made defendants herein pursuant to La. R.S. 47:1998A(2) for the purpose of causing the Sheriffs to hold the Taxes paid to them under protest segregated pending the outcome of this suit.

5.

Article VII, Section 21B(1)(a) of the Louisiana Constitution of 1974 establishes that all property owned by a nonprofit entity organized and operated exclusively for charitable or health purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax, is exempt from ad valorem taxation.

6.

Petitioner is a non-profit corporation organized and operated exclusively for charitable and health purposes, no part of the net earnings of which inure to the benefit of any private share holder or member thereof and Petitioner has been declared to be exempt form federal and state income taxes.

7.

From March 1, 1994, through the date hereof, Petitioner has been and remains the sole owner and operator of ten (10) nursing homes (the "Facilities") in various parishes of the State, namely: Community Care Center of

Leesville in Vernon Parish, Community Care Center of in Lincoln Parish, Baker Manor Nursing Home in East Baton Rouge Parish, Beauregard Nursing Center in Beauregard Parish, Tioga Manor in Rapides Parish, Bayou Vista Nursing Center and Oak Haven Nursing Home in Avoyelles Parish, The Columns in Catahoula Parish, D'ville House in Ascension Parish, and Ridgecrest Nursing Home in Ouachita Parish.

8.

Petitioner timely filed with the Assessors renditions with respect to the Facilities for 1995 ad valorem tax purposes in which Petitioner claimed all of the Facilities to be exempt from ad valorem taxation under Article VII, Section 21B(1)(a) of the Louisiana Constitution of 1974.

9.

The Assessors disallowed Petitioner's said claims for exemption of the Facilities and scheduled the Facilities for assessment of 1995 ad valorem taxes.

10.

Upon notice of such disallowance, Petitioner timely filed Notices of Appeal, Requests for Board of review (Form 3101), pursuant to La. R.S. 47:1992©, with the respective parish Boards of Review, and Petitioner appeared before the respective Boards of Review and asserted its claim that the

Facilities are exempt for ad valorem taxation.

11.

All of the Boards of Review affirmed the decisions of the Assessors that the Facilities are not exempt from ad valorem taxation.

12.

Pursuant to La. R.S. 47:1992(D), Petitioner timely appealed the decisions of the Boards of Review to the Commission.

13.

On February 13, 1996, following a hearing and the introduction of overwhelming and uncontroverted evidence, the Commission found that "Comm-Care Corporation is a non-profit corporation operated for health and welfare purposed, exempt from federal and state income taxation as required in the 1974 Constitution Article VII, Section 21B(1)(a)."

14.

The Commission's said finding, as alleged in paragraph 13 hereinabove, is tantamount to a determination, *ipso facto*, that Petitioner's Facilities are exempt form ad valorem taxation.

15.

The Commission's decision that Petitioner's Facilities were not exempt from ad valorem taxation, despite its finding as alleged in paragraph 13 hereinabove, was arbitrary and capricious and amounted to a clear abuse

or unwarranted exercise of the Commission's discretion and must therefore be reversed.

**WHEREFORE,** Petitioner Comm-Care Corporation prays that after due proceedings had herein the decision of the Tax Commission be REVERSED and judgment rendered herein in favor of Petitioner Comm-Care Corporation (i) determining that all of Petitioner's Facilities are exempt from ad valorem taxation under Article VII Section 21B(1)(a) Louisiana Constitution of 1974, (ii) ordering the defendant Sheriffs to refund to Petitioner all of the Taxes paid under protest by Petitioner, with interest pursuant to La. R.S. 47:2110(A), and (iii) for such other and further relief as law, equity and the nature of the case may require.

Respectfully submitted,

/s/ John A. Stassi, II
JOHN A. STASSI II(Bar No. 12412)
STASSI, GRIFFITH & CONROY,L.L.C.
3838 N. Causeway Blvd,Suite 3030
Metairie, Louisiana 70002
(504) 837-7171

/s/ Paul S. West
PAUL S. WEST (Bar No. 13375)
McGLINCHEY STAFFORD LANG
Ninth Floor, One American Place
Baton Rouge, Louisiana 70895
(504) 383-9000

ATTORNEYS FOR
COMM-CARE CORPORATION

CERTIFIED TRUE COPY
MARCH 8, 1996
BY: /s/Deputy Clerk

No. 425,365

| | | |
|---|---|---|
| COMM-CARE CORPORATION | § | 19TH JUDICIAL DISTRICT COURT |
| VERSUS | § | PARISH OF EAST BATON ROUGE DIVISION "M" |
| LOUISIANA TAX COMMISSION, ET AL | § | STATE OF LOUISIANA |
| FILED: _____ | § | _____ DEPUTY CLERK |

DECLINATORY AND PEREMPTORY EXCEPTIONS

NOW INTO COURT, through undersigned counsel, come Defendants, LEE J. THEVENOT, in his capacity as assessor for the PARISH OF AVOYELLES; JEWETTE FARLEY, in his capacity as Assessor for the PARISH OF LINCOL; ROY D. MILLER, in his capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION; EUGENE CAVANAUGH, in capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA; RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and FRANK A. HOWARD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH

OF VERNON (hereinafter referred to as Exceptors) appearing herein solely for the purpose of these exceptions, who except to the Plaintiff's suit and petition on the following grounds:

1.

Plaintiff brings this action before a Court of improper venue, insofar as the Defendant and Exceptor, FRANK A. HOWARD is concerned. Accordingly, Exceptors assert an exception of improper venue.

2.

Plaintiff's suit is prescribed; Plaintiff is required by law to exhaust administrative remedies prior to commencement of judicial proceedings, and Plaintiff's suit is void of any allegations of having complied with the statutory and Constitutional guidelines, in particular with R.S. 47:2110 and 2101, which require payment of the taxes under protest in the year(s) for which the taxes are due.

3.

The allegations of Plaintiff's petition are devoid of any statement or allegation that the taxes for the year 1995 have been paid at all, much less by the December 31, 1995 deadline. Louisiana Constitution Article 7, Section 18(E) mandates that the procedures established by law for challenging the correctness of assessments be complied with, which procedure was not followed correctly by Plaintiff herein.

4.

The petition of Plaintiff discloses no cause of action, in that Plaintiff has failed to timely pay the taxes under protest, as required by law, and failed to comply with the required procedures to protest the assessment, as detailed hereinabove.

WHEREFORE, Exceptors pray the these exceptions be maintained and Plaintiff's suit be dismissed at Plaintiff's cost.

RESPECTFULLY SUBMITTTED,

/s/Tony C. Tillman

Tony C. Tillman
P.O. Drawer 648
Leesville, LA 71496-0648
(318) 239-7983
Bar Roll ID #12791

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been served upon John A. Stassi, II 3838 North Causeway Blvd., Suite 3030, Metarie, Louisiana 70002, and Paul S. West, 9th Floor, One American Place, Baton Rouge, Louisiana 70895, either by mailing it by first-class United States Mail, properly addressed and postage prepaid, or by delivery on this 18th day of March, 1996.

/s/Tony C. Tillman
Tony C. Tillman

No. 425,365

| | | |
|---|---|---|
| COMM-CARE CORPORATION | § | 19TH JUDICIAL DISTRICT COURT |
| VERSUS | § | PARISH OF EAST BATON ROUGE DIVISION "M" |
| LOUISIANA TAX COMMISSION, ET AL | § | STATE OF LOUISIANA |
| FILED: _____ | § | _____ DEPUTY CLERK |

MEMORANDUM IN SUPPORT OF DECLINATORY AND PEREMPTORY EXCEPTIONS

NOW INTO COURT, through undersigned counsel comes Defendants, LEE J. THEVENOT, in his capacity assessor for the PARISH OF AVOYELLES; JEWETTE FARLEY, in his capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER, in his capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION; EUGENE CAVANAUGH, in capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA; RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and FRANK A. HOWARD, in his capacity as Sheriff and

Ex-Officio Tax Collector of the PARISH OF VERNON (hereinafter referred to as Exceptors) and for their Memorandum in Support of Declinatory and Peremptory Exceptions respectfully state the following:

The plaintiff herein, COMM-CARE CORPORATION, has instituted suit against the above Defendants in their capacities Assessors and Sheriffs for parishes in the State of Louisiana, along with the Tax Commission. Plaintiff contends that it is a non-profit, tax-exempt, corporation and not subject to ad valorem taxation. Its suit seeks a judgment declaring it to be a tax-exempt entity and seeks the return of certain sums from the various tax collectors.

Plaintiff prays that the Sheriffs be ordered to return all taxes paid under protest by Petitioner, but its Petition is devoid of any allegations that such taxes were paid under protest for the tax year 1995. The tax year at issue in the present suit is the collection for calendar year 1995.

The Petition filed in the above-entitled matter does not disclose any sums allegedly paid under protest, nor specify the amount of any sums which are sought to be recovered by Petitioner herein.

Exceptors filed an exception of improper venue. R. S. 13:5104(B) provides that a suit against a political subdivision of the State, or against an

employee or officer of the subdivision, for conduct arising out of the discharge of his official duties shall be instituted before the district court of the judicial district in which the subdivision is located. Louisiana R.S. 13:5102(B) defines a political subdivision that includes the sheriff in that definition. Accordingly, any suit against the exceptor, FRANK A. HOWARD, in his official capacity as the Sheriff and Tax Collector of Vernon Parish, Louisiana must be instituted in Vernon Parish, Louisiana, and, accordingly, an exception of improper venue should be granted.

Exceptors have filed exceptions of no cause of action and prescription, which are aimed essentially at the same issues. Petitioner has ignored substantial Constitutional and statutory provisions which detail the actions required to be taken by a taxpayer if the taxpayer desires to contest its assessment.

Section 18(E) of Article 7 of the Louisiana Constitution of 1974 provides that the correctness of assessments are first subject to review by the Parish governing authority and then by the Tax Commission and only "finally" by the courts, and that such review should take place "in accordance with procedures established by law." These procedures are detailed in Title 47.

Plaintiff's Petition does not contend that it timely paid the 1995 taxes under protest, and an examination of the Petition will disclose that it is devoid of any reference to payment of any of the taxes under protest at any time. However, on information and belief, Exceptors contend that all payments made by the Petitioner were made subsequent to January 1, 1996, and accordingly not made on or before December 31, 1995 as is required by law.

R.S. 47:2110 governs suits to recover taxes paid under protest. Petitioner apparently contends that, because the suit was filed within 30 days of its payment, that it is entitled to proceed with this litigation. However, Petitioner fails to acknowledge that the payment itself must have been made no later than December 31 of the year in which the taxes are assessed and due. Therefore, the payment of taxes at any time after December 31, 1995 is too late to allow Plaintiff to contend the taxes at this stage by payment under protest and subsequent litigation.

This issue has specifically been previously addressed by the Court in the case of Capital Drilling Co. vs. Graves, 496 So.2d 487, La.App. 1st Cir. (1986). In Graves, the Court was faced with the issue of timeliness of the payment of taxes "under protest." In Graves, the taxes were paid in March of 1985 for taxes due in the year 1984. The

defendant in that case filed exceptions of no cause of action and prescription, as have been filed in the instant case. The First Circuit in Graves reviewed the issues of prescription, reviewed in detail R.S. 47:2110, and considered the application of R.S. 47:1998 and Louisiana Constitution of 1974, Article 7, Section 25(A). After thorough review of the Constitutional and statutory provisions, the Court concluded that the payment under protest must be made in the calendar year in which the assessment is made.

Accordingly, in the present case, Petitioner must have made the payments on or before December 31, 1995. The Petition curiously avoids any mention whatsoever of the time of payment of any of the taxes on any of the properties in question.

As the First Circuit Court of Appeal points out in Capital Drilling and as it held in Bunch v. Town of St. Francisville, 446 So. 2d 1357 (LA App. 1st Cir. 1984) "the meaning and intent of the law is to be determined by the consideration of the law in its entirety and all other laws on the same subject matter." Petitioner apparently will contend that R.S. 47:2110 is a statute on its own, not part of the balance of the Code, and that it has to be interpreted in a vacuum, on its own, without regard to the balance of the sections dealing with *ad valorem* taxes.

Section 1998 is part of Subtitle III, provisions relating to *ad valorem* taxes, Chapter III, Assessment, Part III, Assessment Procedure. However, §2101 and §2110 are both part of Chapter IV dealing with payment and collection, Part II, Payment and Collection Procedure. Therefore, §2101 establishes the time for payment of all *ad valorem* taxes, and cannot be totally separated or segregated from §2110.

Section 2101 provides in part, in Subsection A(1) that

> "all taxes shall be collected in the year in which the assessment thereof is made, and they shall be designated as the 'taxes for the year,' accordingly as they are collectable. The taxes assessed in each year shall be due in that calendar year..."

Accordingly, all *ad valorem* taxes are <u>due</u> in the calendar year for which they are assessed. Therefore, as §2101 A(1) goes on to provide, "that they shall be paid on or before the 31st day of December in each respective year..."

In <u>Graves</u>, the First Circuit further states that they correctness of assessments by the assessor must be appealed administratively first to the Parish governing authority, and then to the tax commission; only thereafter can the assessment be appealed judicially (see Louisiana Constitution 1974,

Article 7, Section 18(E); R.S. 47:1992; R.S. 47:1989; and R.S. 47:1998.)

For the reasons detailed above, Exceptors contend that the Court should sustain its exceptions of no cause of action and prescription.

Pursuant to Local Rule VIII of the 19th Judicial District Court, undersigned counsel declares that it appears that evidence will be taken at the hearing on these exceptions, and counsel anticipates calling witnesses, as well as having substantial documentary evidence to introduce.

RESPECTFULLY SUBMITTTED:

/s/Tony C. Tillman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been served upon John A. Stassi, II 3838 North Causeway Blvd., Suite 3030, Metarie, Louisiana 70002, and Paul S. West, 9th Floor, One American Place, Baton Rouge, Louisiana 70895, either by mailing it by first-class United States Mail, properly addressed and postage prepaid, or by delivery on this 18th day of March, 1996.

/s/Tony C. Tillman
Tony C. Tillman

19TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

NUMBER: 425,365 DIVISION " M"

COMM-CARE CORPORATION

VERSUS

LOUISIANA TAX COMMISSION, and

LEE J. THEVENOT, in his capacity as assessor for the PARISH OF AVOYELLES; JEWETTE FARLEY, in her capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER, in his capacity as capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION' EUGENE CAVANAUGH, in his capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES PARISH; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA, RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and

JOE TORN TRUNZLER, in his capacity as Sheriff and Ex-Officio Tax collector of the PARISH OF CATAHOULA; WILLIE WAYNE HOUCK, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF LINCOLN; WILLIAM EARL HILTON, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF RAPIDES;

FRANK A. HOWARD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF VERNON; HAROLD L. TRIDICO, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF ASCENSION; WILLIAM BELT, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF AVOYELLES; M. BOLIVAR BISHOP, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF BEAUREGARD; ELMER LITCHFIELD, in his capacity as Sheriff and Ex-Officio Tax Collector for the PARISH OF EAST BATON ROUGE; LAYMON GODWIN, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF OUACHITA

FILED:_____ _____

DEPUTY CLERK

**MEMORANDUM IN OPPOSITION TO**
**PEREMPTORY AND DECLINATORY EXCEPTION**

NOW INTO COURT, through undersigned counsel, comes petitioner Comm-Care Corporation ("Comm-Care") and respectfully submits this memorandum in Opposition to the Peremptory and Declinatory Exceptions of the defendant assessors.

**STATEMENT OF FACTS**

Article VII, Section 21B(1)(a) of the Louisiana Constitution of 1974 establishes that property is exempt from ad valorem taxation if it is owned by a

nonprofit entity organized and operated exclusively for charitable or health purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax. Comm-Care is a non-profit corporation organized and operated exclusively for charitable and health purposed, no part of the net earnings of which inures to the benefit of any private shareholder or member thereof, and Comm-Care has been declared to be exempt from federal and state income taxes.

On March 1, 1994, Comm-Care bought ten (10) nursing homes (the "Facilities") in nine separate parishes in the State. The Facilities' ad valorem tax status for 1994 is presently the subject of a separate proceeding filed in this Court under La. R.S. 47:2110, dismissed on defendants' exception of prescription on appeal in the Court of Appeal, First Circuit.

For 1995 ad valorem tax purposes, Comm-Care timely filed renditions with the defendant assessors and claimed all of the facilities to be exempt form ad valorem taxation under Article VII, Section 21B(1)(a) of the Louisiana constitution of 1974. The assessors disallowed Comm-Care's claims for exemption and assessed the facilities for 1995 ad valorem taxes. Upon notice of such disallowance, Comm-Care timely

filed Notices of Appeal, Requests for board of Review (Form 3101), pursuant to La. R.S. 47:1992(C), with the respective parish boards of review, and Comm-care appeared before the respective boards of review and asserted its claim that the facilities are exempt from ad valorem taxation. All of the boards of review affirmed the decisions of the assessors that the facilities are not exempt form ad valorem taxation. Pursuant to La. R.S. 47:1992(D), Comm-Care timely appealed the decisions of the boards of review to the Louisiana State Tax Commission.

On February 13,1996, following a hearing and the introduction of essentially uncontroverted evidence, the tax commission found that "Comm-Care Corporation is a non-profit corporation operated for health and welfare purposes, exempt from federal and state income taxation as required in the 1974 Constitution Article VII, Section 21B(1)(a)." In spite of this finding, however, the Commission ruled against Comm-Care based on its further determination, contrary to Constitution and the evidence adduced, "that Comm-Care was not operating its nursing homes in a 'charitable' manner." On February 13, 1996, the day of the tax commission's adverse determination, Comm-Care paid the 1995 taxes under protest. On February 27, 1996, within thirty (30) days of the Tax Commission's

decision, Comm-Care filed a Petition for Judicial Review with this Court and caused all of the respective sheriffs, as tax collectors of the nine parishes, to be served with notice of this suit.

LAW AND ARGUMENT

The defendant assessors claim prescription and no cause of action because Comm-Care's payment under protest was not made before December 31, 1995.

Comm-Care's Petition for Judicial Review was filed under La. R.S. 47:1998, not La. R.S. 47:2110, as the assessors seem to believe. Comm-Care has exhausted all administrative remedies, and it is now seeking judicial review because it is dissatisfied with the action of the tax commission. See paragraph 1 of the Petition. Under La. R.S. 47:1998,

Any taxpayer or bona fide representative of an affected tax-recipient body in the state dissatisfied with the action of the tax commission under the provisions of R.S. 47:1989, shall have the right to institute suit within thirty days of the decision of the tax commission in either the district court for the parish where the tax commission is domiciled or the district court where the property is located contesting the correctness of assessment. . . .

. . 47:1998(A)(1). (Emphasis added).

In this case, the decision of the tax commission was rendered on February 13, 1996, and Comm-Care's Petition was filed on February 27,1996, within thirty (30) days. Comm-Care's cause of action under La. R.S. 47:1998 is not prescribed regardless whether the subject taxes were paid before or after the end of the year. In Rickey Tri-Key Partnership v. Dupleix, 462 So. 2d 235, 236 (La. App. 3d Cir. 1985), payment of 1982 taxes was made under protest on January 27, 1983. The tax commission affirmed the assessment on April 22, 1983, and the petition for review was filed on May 23, 1983, within thirty (30) legal days of the tax commission's decision. The Court of Appeal held that the suit was not prescribed:

> LSA-R.S. 47:1998(A) expressly gives appellant the right to contest an adverse decision of the Tax Commission in district court within thirty days of that decision. Id. at 236.

The Court differentiated between La. R.S. 47:2110, which requires that suit be filed within thirty (30) days of payment under protest, and La. R.S. 47:1998, which requires that suit be filed within thirty (30) days of the tax commission's decision. Id. at 236-37.

Comm-Care filed its petition within the requisite thirty (30) days following

the tax commission's decision, as required by La. R.S. 47:1998. Defendants cannot fabricate additional prerequisites that are not a part of the statute to deny Comm-Care its right to judicial review. Comm-Care abided by the requirements of La. R.S. 47:1998, and cannot be precluded from seeking judicial review of the tax commission's adverse determination.

The rules of statutory construction do not provide for interpretation of a statute when it is unambiguous. Louisiana Civil Code article 9 states:

> When a law is clear and unambiguous and its application does not lend to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

La. R.S. 47:1998 is not ambiguous or unclear. Thus, the statute itself must be interpreted as written. Comm-Care complied with the requirements of the statute, and its cause of action is not prescribed.

The assessors make much of the fact that the 1995 taxes were paid after December 31. However, La. R.S. 47:1998A(2) clearly provides for this:

> Any taxpayer who has filed suit under this provision and whose taxes have become due shall pay said taxes under protest and shall cause to issue notice to the

officer designated by law for the collection of such tax under the provisions of R.S. 47:2110(E). However, the portion of taxes that is not in dispute shall be paid without being made subject to the protest. (Emphasis added.)

La. R.S. 47:2110E provides:

Any taxpayer in the state who has paid his taxes under protest as provided herein and who has fled suit under the provisions of R.S. 47:1856, R.S. 47:1957, or R.S. 47:1998, shall cause to issue in said suit notice to the officer or officers designated for the collection of said taxes in the parish or parishes where the property is located, and such notice shall be sufficient to cause said officer or officers to further hold said amount segregated pending the outcome of the suit. (Emphasis added.)

La. R.S. 1998A(2) obviously contemplates this precise situation for review being filed by a taxpayer "whose taxes have become due" i.e. after December 31. Thus, a post-December 31 payment under protest is no bar to a La. R.S. 47:1998 petition for review.

**CONCLUSION**

Comm-Care has complied with all of the requirements of La. R.S. 47:1998,

which is the statute under which review of a tax commission decision is sought. Comm-Care's Petition for Judicial Review was timely filed within thirty days of the tax commission's decision, and the assessors' exception of prescription must therefore be denied.

Respectfully submitted,

__/s/John A. Stassi II_____

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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that he has this 24th day of April, 1996, mailed a copy of the foregoing pleading to all counsel of record for all other parties in this action by placing same properly addressed in the U. S. Mail with sufficient postage to insure delivery.

/s/ John A. Stassi II

John S. Stassi, II

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 97-CA-0555

COMM-CARE CORPORATION
Plaintiff-Applicant
VERSUS
LOUISIANA TAX COMMISSION, ET AL
Defendant-Respondent

ORIGINAL BRIEF OF APPELLEES, LEE J. THEVENOT, JEWETTE FARLEY, ROY D. MILLER, GERALD MCCRORY, JR., EUGENE CAVANAUGH, FRANK GRANGER, III, RALPH GILL, CARMON WALKER, RICH BAILEY, JOE TORN TRUNSLER, AND WILLIE WAYNE HOUCK ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE THE HONORABLE CELIA R. CANGELOSI, JUDGE
DIVISION "M", CIVIL DOCKET NO. 425,365

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CIVIL CASE

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## STATEMENT OF THE CASE

Comm-Care Corporation (hereinafter referred to as Comm Care) filed a petition for judicial review in the 19th Judicial District court, on February 27, 1996, from an adverse decision by the Louisiana Tax Commission, rendered on February 13, 1996. The Defendants filed exceptions of prescription and of no cause of action.

The Honorable Celia R. Cangelosi of the 19th Judicial District Court maintained the Defendant's exception of prescription and dismissed the appeal, with prejudice, at Plaintiffs' cost.

The Plaintiffs in due course filed a devolutive appeal from that adverse judgment and applied for a writ of Review of the Supreme Court, which writ was denied. The matter comes before this court on the appeal from the final decision of the 19th Judicial District Court.

## I. SPECIFICATION OF ERRORS

**Plaintiffs contend that the trial court made the following errors:**

1. The trial court erred in maintaining the Defendants' exception of prescription because the statute under which this appeal of the tax Commission's decision arises does not require that the subject taxes must be paid when "due."

2. The trial court erred by reading La. R.S. 47:1998 in pari materia with La. R.S. 47:2110, and thereby

reading into La. R.S. 47:1998 its own interpretation of La. R.S. 47:2110, that an appeal to the District Court under La. R.S. 47:1998 will not lie if the subject taxes are not paid when "due" on December 31 of the tax year, when it was impossible for Comm-Care to pay the tax when "due" without divesting the Tax Commission of its jurisdiction before it decided the case before it.

3. The trial court erred by maintaining Defendant's exception of prescription in a 1998 case when it was impossible to pay the taxes when "due" without divesting the Tax Commission of its jurisdiction.

4. The trial court erred by denying Comm-Care judicial review of the Tax Commission's decision in accordance with La. R.S. 47:1998, thereby violating Comm-Care's Due Process rights under the 14th Amendment of the United States Constitution.

## II. ARGUMENT

**A. APPELLATE CONTENDS THAT THE TRIAL COURT ERRED IN MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION BECAUSE THE STATUTE UNDER WHICH THIS CAUSE OF ACTION ARISES DOES NOT REQUIRE THAT THE SUBJECT TAXES MUST BE PAID.**

Appellate contends that it could not have paid the taxes before the end of the tax year, without depriving the Tax Commission of its jurisdiction, pursuant to LSA R.S. 47:1990. This

argument was raised by the Appellate at the trial level, and the trial court properly rejected that argument. As Judge Cangelosi sets forth in her written reasons for judgment, citing the decision of this court in Comm-Care Corporation vs. La Tax Commission, 96-0039 (La. App. 1st Cir. 1996) and cases cited therein, Judge Cangelosi states:

The First Circuit has consistently, continually, and recently held that taxes "paid under protest" must be paid prior to becoming delinquent and that taxes paid after the due date of December 31, of the tax year are delinquent taxes, defeating a claim for recovery of delinquent taxes paid under protest under Section 2110. (See page 4 of Judge Cangelosi's written reasons.)

Judge Cangelosi continues to state that she could not ignore the First Circuit's construction of the term "due" as distinguished from taxes that are "delinquent". As Judge Cangelosi correctly notes, Title 47 does not provide any scheme whereby a taxpayer can use and administrative appeal process to operate as a stay or suspension to pay the taxes when they become "due". Additionally, as she correctly notes, R.S. 47:1998 A(1) does specifically provide that any taxpayer who files suit under that section and whose taxes have become due shall pay the taxes under protest. The legislature obviously contemplated that

cases arising under Section 1998 would still be pending as of December 31, and specifically provided that to preserve other rights to litigate the issue of the taxes, the taxes must be paid under protest when they become due. There is therefore no great mystery or revelation in an argument that 1998 does in fact require the timely payment of taxes, as defined by R.S. 47:2101.

The Appellate also further ignores the ruling of the Supreme Court of Louisiana in Triangle Marine, Inc. vs. Savoie, 95-2873 (La. 1996). The court in that case specifically held that a challenge to the imposition of ad valorem taxes assessed against exempt property is a tax legality challenge which must be pursued directly in district court pursuant to R.S. 47:2110 and not through the administrative process of R.S. 47:1998. Therefore, if the trial court's decision with regard to the issue of the exception of prescription were to be overturned by this court, in light of the Supreme Court's ruling in Triangle Marine vs. Savoie, the exception of no cause of action filed herein buy the respondent should have been granted. The court's ruling in Triangle Marine was not a departure from prior jurisprudence, an the court in that case details the lines of cases utilized by the court in recognition the distinction between correctness and legality issues.

**B. APPELLATE CONTENDS THAT THE TRIAL COURT ERRED IN READING LA. R.S. 47: 1998 IN PARI MATERIA WITH LA. R.S. 47:2110**

plaintiff's own petition is ample evidence that this assignment of error has no merit. In paragraph 1 of Plaintiff's Petition for Judicial Review, Plaintiff assets that the petition is brought pursuant to R.S. 47:1998 A(1), however in the prayer of Plaintiff's petition, Plaintiff prays for a refund to petitioner of all of the taxes paid under protest, "with interest pursuant to La. R.S. 47:2110 (A)."

Plaintiff's petition clearly recognizes that there is a relationship between Section 1998 and Section 2110. Section 1998 is part of subtitle 3, provisions relating to ad valorem taxes, Chapter III Assessment, Part III Assessment Procedure. Sections 2101 and Section 2110 are both part of Chapter IV dealing with payment and collection, Part II, Payment and Collection Procedures. Therefore, Section 2101 establishes a time for all ad valorem taxes to be paid, and should be read in conjunction with Section 2110 as well.

Appellate relies on Churchill Farms, Inc. vs. Louisiana Tax Commission 338 So.2d 963 (LA App. 4th Cir 1976) for the proposition that § 1998. Appellee agrees that was, in fact, the ruling of the Fourth Circuit Court of Appeals,

according to the facts presented to it in the Churchill Farms case. However, the case is distinguishable since the issue of timely payments was not before the Court nor was it addressed in any fashion. The issue of when taxes are found to be due, as that is defined by §2110 (A), was not presented in Churchill Farms, and therefore Churchill Farms is not authority for the proposition that §2101 should not be construed in *pari materia* with §2110 or 1998. Churchill Farms must be limited to facts, which concern whether the taxpayer, as a condition precedent to challenging the legality of assessment of §2110, had to file a sworn list of its assets. That issue is separate from the facts of the present case, and therefore the ruling in Churchill Farms is distinguishable and not relevant to the issue presented in the instant case.

Appellate further contends that the Third Circuit in Rickey Tri-Key Partnership v. Dupleix, 462 So. 2nd 235, 236 (La. App. 3d Cir. 1985), is authority for the proposition that Section 1998 and Section 2110 should not be read in conjunction with each other. Judge Cangelosi took note of that decision, and rejected its reasoning, correctly noting that the late payment of taxes was not made the issue in that case. Therefore the decision of the court in Rickey is not authority for the proposition as cited by Appellates.

Furthermore, Comm-Care's reliance on Rickey is misplaced, in that it ignores Section 1998 A(2) as discussed above, which requires that when the taxes become due, such taxes shall be paid under protest.

**C. THE APPELLATE CONTENDS THAT THE TRIAL COURT ERRED BY MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION IN A 1998 CASE WHEN IT WAS IMPOSSIBLE TO PAY THE TAXES WHEN "DUE" WITHOUT DIVESTING THE TAX COMMISSION OF ITS JURISDICTION.**

Appellee contends that Comm-Care is incorrect in its contention that the Tax Commission looses its jurisdiction totally if the taxes are paid if the decision is final. R.S. 47:1998 (A)2 specifically requires the payment of taxes when they become due. R.S. 47:2110 provides that the taxes are paid under protest, and are held in a segregated account pending the outcome of the suit. Accordingly, the Appellees contend that the Tax Commission would not under such circumstances be divested totally of its jurisdiction, in that the taxes have not actually been paid to the taxing authority but are being held by the Sheriff as ex officio tax collector, in segregated accounts, pending a determination of whether or not the taxes are in fact owed.

Additionally, as noted above, Comm-Care erred in pursuing its protest

through the Tax Commission rather that through the District Courts pursuant to the Supreme Court's ruling in Triangle Marine.

**D. APPELLATE CONTENDS THAT THE TRIAL COURT ERRED BY DENYING COMM-CARE JUDICIAL REVIEW IN ACCORDANCE WITH LA. R.S. 47:1998 THEREBY DENYING IT DUE PROCESS OF LAW.**

Appellate contends that the trial court denied it due process by denying it judicial review of its claim in the present case.

Appellate relies on a substantial number of U.S. Supreme Court cases dealing with appeals by various taxpayers throughout the United States. However, these cases do have one common thread, they deal with taxes which are assessed in violation of federal law. The present case does not deal with such an issue at all.

Certainly any litigant is entitled to basic due process. The U.S. Supreme Court has described the "root requirement" of the Due Process Clause as "That an individual be given an opportunity for hearing before he is deprived of any significant property interest." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985). However, the cases cited by Appellate in the present case do not deal with the same situations as the case at bar. There are no allegations contained in the petition for review that the taxes

sought to be collected were imposed in violation of the laws or the Constitution of the United States. In fact, the Appellate is claiming a Louisiana Constitutional Exemption, pursuant to Article VII, Section 21B (1)(a).

Appellate cites McKesson Corp v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36 (1990) for the proposition that due process under the Fifth and Fourteenth Amendments require states to provide a "clear and certain remedy" for aggrieved taxpayers to a contest tax assessments. Whereas that statement is in fact contained in McKesson, it is an incomplete citation to the quote, in that McKesson dealt with circumstances under which the state allowed tax preferences for alcoholic beverages manufactured from certain products grown in the state, and the case involved an allegation that such taxes violated the Commerce Clause of the United States Constitution, and that it discriminated against interstate commerce.

The case of Reich v. Collins, 115 S.Ct. 547 (1994) cited by Appellate also contains similar language with regard to the "clear and certain remedy". However, Reich dealt with taxes assessed by the State of Georgia against retirement benefits paid by the Federal Government, but exempted retirement benefits paid by the state. The issue

dealt with the illegally assessed taxes required to be paid by federal retirees and the discrimination against those retirees.

The Appellates further rely on Carpenter v. Shaw, 280 U.S. 363 (1930). That case dealt with an interpretation of a federal treaty between the United States and the Choctaw and Chickasaw tribes. In Shaw, the State of Oklahoma was attempting to assess ad valorem taxes which the Supreme Court ultimately determined were in contravention of an 1890 treaty.

All of these cases have the consistent thread of taxes attempted to be assessed by the various states which ultimately were determined to have been violative of either federal statutory or constitutional provisions. Such is not the situation in the case at bar, and accordingly, although the language cited by Appellate may be accurate, it does not provide authority for this court to utilize the rulings by the Supreme Court in those respective cases.

Appellate contends that it was denied due process since it was not granted a review in the present case. However, the failure of the Appellate to obtain the review was due to its own poor judgment and erroneous decisions, not to any unconstitutional tax or violation of Federal Law.

In Appellate's petition, Appellate acknowledges that the Petitioner filed

for an exemption from taxes but that the assessors disallowed petitioner's claims. See paragraphs 8 and 9 of petition. Appellate further avers that the Petitioner filed notices of appeal before the boards of review and ultimately appealed directly to the Tax Commission. See Paragraphs 10 through 12 of the original petition. Therefore, Petitioner was well aware, that its request for exemption had been denied, and was aware of the amount of the taxes owed on each of its properties. It would have been a very simple matter for the Appellate to have paid its taxes under protest, as it ultimately did, and to sue pursuant to Section 2110. The failure of the appellate to take such action timely is the fault of no one but itself, and no one is to blame but the Appellate. Therefore no state action has resulted in a denial of due process to the Appellate. If the Appellate did not abide by the Statutory scheme provided, no one else can be blamed.
Appellate further contends that it chose to contest the 1995 assessments pursuant to what it believed to be a "clear and certain" remedy pursuant to R.S. 47:1998, and that after having complied with what it thought the requirements of 1998 to be, was told by the trial court that it was necessary to read the statute in pari materia with others. Appellate contends that this is a denial of due process. This argument

ignores the fact that Comm-Care and its counsel had notice prior to the end of 1995 that the courts of Louisiana were in fact going to interpret Section 1998 in conjunction with Section 2110 and other portions of Title 47.

Comm-Care and it's present counsel were parties to a proceeding before the 19th Judicial District Court, in which Judge Frank Saia rendered judgment on July 31, 1995 sustaining a peremptory exception of prescription. That case ultimately was affirmed by the First Circuit Court of Appeal, Docket number 96-CA-0039, in which case writs have been granted by the Supreme Court of Louisiana, and a decision is pending, in case number 96-C-2455. Additionally, the First Circuit had previously addressed a similar issue in Capital Drilling Company v. Graves, 495 So. 2d, 487 (La. App. 1st Cir. 1986). Accordingly, Appellate was on notice that the courts in Louisiana, and particularly in the First Circuit, were going to interpret sections of Title 47 together, and accordingly, the courts of this state did not change course, they merely provided more detailed analysis and reasoning for the same action previously taken by the courts.

Furthermore, Appellate's reliance on Reich, supra. is ill founded in that the Supreme Court in that case did not absolutely bar states from reconfiguring its schemes but only form "unfairly"

doing so in the form of a bait and switch tactic. See Reich page 550. As discussed above, Appellate was on notice that the courts of this state were interpreting Sections 1998 and 2110 in conjunction with each other and therefore there was no unfair bait and switch change and the Appellate incorrectly tries to characterize itself as an innocent victim. In fact, as Appellate points out on page twelve of the brief filed herein, Comm-Care made a choice to contest the 1995 assessments by using Section 1998, and it apparently chose to do so without complying fully with the requirements of that section.

Appellate continues within its argument under this assignment of error to discuss rules of statutory interpretation. For purposes of this argument, Appellees will assume that this in fact is part of the same argument on the same assignment of error. The rules of statutory construction were addressed by this circuit in great detail in Capital Drilling, supra. and counsel calls to this courts attention the detailed analysis by that prior panel of the rules for statutory construction. Appellate contends that this court correctly analyzed various sections of Title 47 in that case and in the recent decision of Comm-Care Corporation v. Louisiana Tax Commission, 96-0039 (La. App. 1st Cir. 1996), and that, as argued

above, Section 1998 must be interpreted in conjunction with Sections 2101 and 2110.

Appellate cites the cases of Smith v. Town of Vinton, 25 So. 2d, 237 (La. 1946) and Kaufman v. State Department of Public Safety and Driver's License Division 286 So. 2d, 723 (La. App. 1st Cir. 1973) for the proposition that statutory rules of construction require that statues be strictly construed. Appellees agree that such is the case, and that an examination of Title 47 in its entirety, including the organization of the sections into various chapters clearly shows the legislative intent to have a predeprivation and a postdeprivation remedy. However the sections are not designed to be and cannot be read in isolation from each other, totally segregated and apart, with each statute standing on its own. Appellate's own petition argues against such interpretation, since section 1998 on its face refers to section 2110 for purposes of determining how suits under protest are to be handled. To read any of these statutes in isolation by themselves would in fact lead to absurd consequences, in that no complete remedy would be provided to any taxpayers. The sections must be examined as a whole and read in conjunction with the entirety of the sections applicable to the same issues.

## III. CONCLUSION

The Trial Court was correct in its rulings in the present case, and correctly maintained the exception of prescription filed in the case.

Section 1998 must be read in conjunction with Section 2101 and 2110. Failure to do so would lead to absurd consequences. The only "due" date established in Title 47 provides that the ad valorem taxes are due by December 31. Failure to pay the taxes when due deprives a taxpayer of the right to proceed to pay the taxes at some subsequent date under protest and later seek a refund of those taxes.

The Appellate has not been denied due process, and in fact has a history of litigation in this area and was well award of the provisions of Louisiana Courts with regard to both Sections 1998 and 2110, and prior to December 31, 1995, was on notice that those sections were in fact being read in conjunction by the courts of this state, accordingly, the Appellate had ample notice and opportunity to timely pay its taxes. Its failure to do so is the sole and only cause of its loss of its right to litigate the issue. It has not been denied due process by any actions of any party to this proceeding.

Appellees respectfully request that the judgment of the trial court be affirmed and that this appeal be dismissed at Appellate's cost.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tony C. Tillman, hereby certify that I forwarded a true and correct copy of the foregoing counsel of record for all the other parties in this action: Paul S. West, Vyrona M. Wiltz, John A. Stassi II, by placing same in the U.S. Mail and sufficient postage to ensure delivery on this the 28th day of April, 1997.

/s/Tony C. Tillman
Tony C. Tillman

SUPREME COURT OF LOUISIANA

NO. 98-C-1216

COMM-CARE CORPORATION

PLAINTIFF-APPLICANT

VERSUS

TAX COMMISSION, and LEE J. THEVENOT, in his capacity as Assessor for PARISH OF AVOYELLES; JEWETTE FARLEY, in her capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER in his capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR., in his capacity as Assessor for the PARISH OF ASCENSION; EUGENE CAVANAUGH, in his capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES PARISH; CARMON WALKER, in her capacity as Assessor for the PARISH OF CATAHOULA; RICH BAILEY, in his capacity as Assessor for the PARISH OF OUACHITA; and JOE TORN TRUZLER, in his capacity as Sheriff and Ex-Officio tax Collector of the PARISH OF CATAHOULA; WILLIE WAYNE HOUCK, in his capacity as Sheriff and Ex-Officio tax Collector of the PARISH OF LINCOLN; WILLIAM EARL HILTON, in his capacity as Sheriff and ex-Officio tax Collector of the PARISH OF RAPIDES; FRANK A. HOWARD, in his capacity as Sheriff and ex-Officio tax Collector of the PARISH OF VERNON; HAROLD L. TRIDICO,

in his capacity as Sheriff and ex-Officio tax Collector of the PARISH OF ASCENSION; WILLIAM BELT, in his capacity as Sheriff and ex-Officio Tax Collector of the PARISH OF AVOYLLES; M.BOLIVAR BISHOP, IN HIS CAPACITY AS Sheriff and ex-Officio Tax Collector of the PARISH OF BEAUREGARD; ELMER LITCHFIELD, in his capacity as Sheriff and Ex-Officio tax Collector of the PARISH OF EAST BATON ROUGE; LAYMON GODWIN, IN HIS CAPACITY AS SHERIFF AND EX-OFFICIO TAX Collector of the PARISH OF OUACHITA

DEFENDANT-RESPONDENT

---

ON APPLICATION FOR SUPERVISORY AND REMEDIAL WRITS OF CERTIORARI OR REVIEW FROM THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE PARISH THE HONORABLE CELIA R. CANGELOSI, JUDGE DIVISION "M" CIVIL DOCKET NO. 425,365 AND THE FIRST CIRCUIT COURT OF APPEAL 97/CA/0555

**OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI OR REVIEW**

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FARLEY, ROY D. MILLER, GERALD MCCRORY, JR., EUGENE CAVANAUGH, FRANK GRANGER, III, RALPH GILL, CARMON WALKER, RICH BAILEY, IN THIER RESPECTIVE CAPACITIES AS THE ASSESSOR FOR THEIR RESPECTIVE PARISH

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CIVIL CASE

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**OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI OR REVIEW**

Defendants/Respondent, Frank A. Howard, Lee J. Thevenot, Jewette Farley, Roy D. Miller, Gerald McCrory, Jr., Eugene Cavanaugh, Frank Granger, III, Ralph Gill, Carmon Walker, and Rich Bailey, in their respective capacities as the Assessor for their respective Parish, they file this opposition to the Application for Writs of Certiorari or

review filed by Applicant, Comm-Care Corporation herein.

Respondents have no disagreement with applicants Statement of the Applicant introduced overwhelming and uncontroverted evidence to the tax Commission. The issue on the Merits is not before this Court since the case was disposed of by Trial Court and the Court of Appeal on an exception, and accordingly, the evidence introduced to the Commission was never examined by the trial Court nor the Court of Appeal and it is therefore not an issue in this application.

**ASSIGNMENT OF ERRORS ALLEGED BY APPLICANT**

A. The Court of Appeal erred in maintaining defendant's exception of prescription because the statute under which this cause of action arises does not require that the subject taxes must be paid timely.

B. The Court of Appeal erred by reading La. R.S. 47:2110 in *pari materia* with La. R.S. 47:1998 because these two statutes were enacted at different times for different purposes.

C. The Court of Appeal erred in maintaining Defendant's exception of prescription in a Section 1998 case when it was impossible to pay the taxes when "due" without divesting the Tax Commission of its Jurisdiction.

D. The Court of Appeal erred in denying Comm-Care judicial review in accordance with LA. R.S. 47:1998 thereby denying it due process of law.

## SUMMARY OF THE ARGUMENT

The Trial Court was correct in its ruling, and in concluding that LSA R.S. 47:1998 must be read in conjunction with Sections 2101 and 2110. Failure to do so would lead to absurd consequences. The only "due" date established in Title 47 provides that ad valorem taxes are due by December 31, 1998.

## ARGUMENT

**A. THE TRIAL COURT ERRED IN MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION BECAUSE THE STATUTE UNDER WHICH THE CAUSE OF ACTION ARISES DOES NOT REQUIRE THAT THE SUBJECT TAXES MUST BE PAID BY DECEMBER 31, 1998.**

**B. THE TRIAL COURT ERRED IN READING LA. R.S. 47:1998 IN *PARI MATERIA* WITH LA. R.S. 47:2110 BECAUSE THESE TWO STATUTES WERE ENACTED AT DIFFERNET TIMES FOR DIFFERENT PURPOSES.**

Applicant contends that the Trial Court erred in maintaining the Defendant's Exception of Prescription because it contends R.S. 47:1998 does not require that subject taxes must be paid by December 31. This argument is closely related to the Assignment of Error B and the two (2) arguments will therefore be briefed herein together.

These arguments were raised by the Defendant at the Trial Court level, and addressed by Judge Cangelosi in her written reasons. As Judge Cangelosi sets forth in her written reasons for Judgment, which are attached to Applicant's Writ Application as Exhibit "C", citing the decision of the Court of Appeal, First Circuit in Comm-Care Corporation vs. La. Tax Commission, 96-0039 (La. App. 1st Cir. 1996) and cases cited therein, Judge Cangelosi states:

> The First Circuit has consistently, continually, and recently held that taxes "paid under protest" must be paid prior to becoming delinquent and that taxes paid after the due date of December 31, of the tax year are delinquent taxes, defeating a claim for recovery of delinquent taxes paid under protest under Section 2110. (See page 4 of Judge Cangelosi's written reasons.)

Judge Cangelosi further states that she could not ignore the First Circuit's construction of the term "due" as distinguished from taxes that are "delinquent". As Judge Cangelosi correctly notes, Title 47 does not provide any scheme whereby a taxpayer can use an administrative appeal process to operate as a stay or suspension to pay the taxes when they become "due". Additionally, as she correctly notes, R.S. 47:1998A(1) does specifically provide that any taxpayer who

files suit under that section and whose taxes have become due **shall** pay the taxes under protest. The legislature obviously contemplated that cases arising under Section 1998 would still be pending as of December 31, and specifically provided that to preserve other rights to litigate the issue of the taxes, the taxes must be paid under protest when they become due. There is therefore no great mystery or revelation in an argument that 1998 does in fact require the timely payment of taxes, as defined by R.S. 47:2101.

The Applicant also ignores the ruling of the Supreme Court of Louisiana in Triangle Marine, Inc. vs. Savoie, 95-2873 (La. 1996). Although that decision was not rendered by this Court until October 15, 1996, after that suit was filed in the present matter on February 27, 1996, Triangle Marine is a clarification of the law, and not a departure from prior law.

As the Court notes in Triangle Marine, the Supreme Court has recognized a line of distinction between correctness and legality challenges. See Morgan, Louisiana and Texas Railroad Steamship Company v. Picot, 50 La. Ann. 737, 23 So. 948, 950-51(1898). Correctness challenges are directed at issues of regularity or correctness of assessment, and legality challenges are "directed at issues involving the claims the assessment is void for radical defect or that the assessment is inherently invalid." The

Court further notes in Triangle Marine that those distinctions were reaffirmed in Soniat v. Board of State Affairs, 146 La. 450 83 So. 760, 762 (1919).

This Court held in Triangle Marine, that "the vessels owner's challenge to the imposition of ad valorem taxes assessed against allegedly exempt property presents a tax legality challenge. Plaintiff proceeded properly in District Court under LSA-R.S. 47:2110 to contest these taxes as a tax assessment on exempt property is illegal".

Triangle Marine is not a departure in from prior law in Louisiana, and therefore Comm-Care was aware that the appropriate procedure was to proceed not through 1998, but through 2110 to test the legality of the assessment.

As the Court notes in Triangle Marine, the case of Abraham v. Carter, 580 So. 2d 485 (La. App. 4th Cir. 1991) had, prior to Triangle Marine, correctly explained the distinction between a "correctness" claim and a "legality" claim.

Respondent contends that the Court of Appeal, First Circuit had previously addressed related issues and rendered a logical and reasonable interpretation of the *ad valorem* tax provisions in the case of Capital Drilling Co. vs. Graves 496 So. 2d 487 (La. App. 1st Cir 1986). The Court in that case faced a situation similar to that of the instant case, in which the taxes were not paid until

March 5, 1985 for taxes assessed for the year 1984. As the Court of Appeal pointed out in Bunch vs. Town of St. Francisville, 446 So. 2d 1357 (La. App. 1st Cir. 1984) "the meaning and intent of the law is to be determined by the consideration of the law in its entirety and all other laws on the same subject matter." Applicant vigorously argues that R.S. 47:1998 is a statute on its own, not part of the balance of the Title 47, and that it has to be interpreted in a vacuum, on its own, without regard to the balance of the sections dealing with *ad valorem* taxes.

R.S. 47:1998 is part of Subtitle III, provisions relating to *ad valorem* taxes, Chapter III, Assessment, Part III, Assessment Procedure. However, §2101 establishes the time for payment of **all** *ad valorem* taxes, and cannot be totally separated or segregated from §2110.

Section 2101 provides in part, in Subsection A(1) that

> "all taxes shall be collected in the year in which the assessment thereof is made, and they shall be designated as the 'taxes for the year,' accordingly as they are collectable. The taxes assessed in each year shall be due in that calendar year....."

Accordingly, all *ad valorem* taxes are due in the calendar year for which they are assessed. Therefore, as §2101 A(1) goes on to provide, "they shall be

paid on or before the 31st day of December in each respective year...."

Applicant contends that the ruling of the Trial Court and the Court of Appeal in Capital Drilling and in the instant case before the First Circuit, denies the Applicant, as a tax protestor, the opportunity to be heard. Respondent questions how the interpretation in Capital Drilling and in the instant case before the First Circuit, denies the Applicant the right to be heard.

All that is required by Capital Drilling and the First Circuit's decision in the instant case to preserve the Applicant's right to a hearing, is to pay the taxes on or before December31st of the year in which they are assessed and due. Counsel fails to seethe distinction Applicant wants this Court to see with regard to its apparent argument that it should be allowed to pay the taxes at its whim, regardless of when they are assessed or when they are due, and still go forward with a suit to protest. Paying the taxes as they are due, as a normal, reasonable, business would do, does not deny the Applicant the opportunity to be heard; it merely imposes a reasonable condition upon the Applicant in order to preserve its rights.

The Respondent attaches hereto and makes a part hereof as Exhibit A, a copy of the Petition field in the 19th

Judicial District Court by Applicant. Respondent calls to the Court's attention Paragraph 2 of that Petition, in which Applicant relied on R.S. 47:1998 to establish its cause of action. Further, see Paragraph 4 of the Petition in which the Applicant admits that notices were forwarded to the Sheriffs of the various Parishes pursuant to the authority of R.S. 47:2110(E), and to the Prayer of the Petition in which the Applicant prayed for a refund of the taxes paid under protest, with interest, pursuant to R.S. 47:2110(A). Apparently, the Applicant wants Section 1998 and Section 2110 to be construed in *pari materia* when it is convenient and beneficial to do so, but wants Section 1998 to be interpreted in a vacuum when that suits the purposes of Applicant. Respondent contends that Paragraph 4 of Applicant's Petition is a judicial admission that Section 2110, in fact, applies to this case.

An examination of Section 2110 will reveal hat section does not provide any information with regard to who are that proper party Defendants, where the suit will be instituted, venue, or any other necessary matters to determine how to proceed to recover the funds. That information is contained in other sections of Title 47 including, but not limited to Section 1998.

Section 2110 (E) provides that the taxpayer pays his taxes in protest as

detailed in Subsection A, **and** files suit under the provisions of several other section of Title 47, one of which is R.S. 47:1998. Accordingly, Section 1998, clearly relates to other sections of Title 47, and cannot, as is urged by the Applicant, be interpreted in a vacuum.

The Louisiana Legislature also apparently construes R.S. 47:1998 and 2110 in *pari materia*, in that it recently had occasion to amend those sections twice in one session of the Legislature, and chose to amend them in the same act. Act 53 of the 1995 Louisiana Regular Session was approved by the Governor on June 12, 1995. the Act amended and reenacted portions of 1998(F) and 2110(A). Act 272 of the 1995 Louisiana Regular Session was approved by the Governor on June 14, 1995, and amended and reenacted R.S. 47:1998(A)(2) and (B)(3) and Section 2110. Act 272 reenacted the entirety of Section 2110, and included the provisions for notice to be served on the "Officer or Officers designated for collection of said taxes" and provided further that such notice was sufficient to cause those officers (normally being the sheriff and ex-Officio tax collector) that holds a set amount segregated pending the outcome of the law suit authorized by 2110. 2110(E) as enacted by Act 272 of 1995 specifically states that if suit is filed under the

provisions of R.S. 47:1856, 1857, or 1998, such notice as described above shall issue.

It appears quite clear that the Legislature chooses to deal with Sections 1998 and 2110 together, apparently acknowledging that the two (2) statutes deal with related issues.

As the First Circuit correctly pointed out in its recent Decision in Comm-Care Corporation vs. Louisiana Tax Commission, et al., 96-0039 (La. App. 1st Cir., 9/27/96), and in its prior Capital Drilling decision, the provisions of Section 2101A(A) and Section 2171 of Title 47 and Article VII, section 25 (A) of the Louisiana Constitution of 1974 establishes that "*ad valorem* taxes are payable in full on or before December 31 of the tax year." There are no provisions in Title 47 or in the Constitution for a litigant to institute proceedings with regard to a refund of **delinquent** taxes.

As the First Circuit pointed out in Capital Drilling and in Bunch (Pg. 1360)

"a construction of a law which creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the law and will carry out the intention of lawmaker..."

Additionally, as the First Circuit pointed out in Capital Drilling (Pg. 492)

> "to adopt the Plaintiff/Appellant's argument would be to give litigants suing under R.S. 47:2110 a substantial advantage over those pursuing a correctness claim under R.S. 47:1998."

It does not appear to be the legislative intent to give advantages to the tax protestors under one claim versus another; such a construction defies common sense and the plain words of the law.

Applicant relies on Churchill Farms, Inc. vs. Louisiana Tax Commission 338 So. 2d 963 (LA App. 4th Cir 1976) for the proposition that §1998. Respondent agrees that was, in fact, the ruling of the Fourth Circuit Court of Appeals, according to the facts presented to it in the Churchill Farms case. However, the case is distinguishable since the issue of timely payments was not before the Court not was it addressed in any fashion. The issue of when taxes are found to be due, as that is defined by §2110(A), was not presented in Churchill Farms, and therefore Churchill Farms is not authority for the proposition that §2101 should not be construed in *pari materia* with §2110. Churchill Farms must be limited to its facts, which concern whether the taxpayer, as a

condition precedent to challenging the legality of assessment of §2110 had to file a sworn list of its assets. That issue is separate from the facts of the present case, and therefore the ruling in Churchill Farms is distinguishable and not relevant to the issue presented in the instant case.

Applicant further contends that it is somehow denied due process.

Applicant further contends that the Third Circuit in Rickey Tri-Key Partnership v. Dupleix, 462 So. 2nd 235, 236 9La. App. 3d Cir. 1985), is authority for the proposition that Section 1998 and Section 2110 should not be read in conjunction with each other. Judge Cangelosi took note of that decision, and rejected its reasoning, correctly noting that the late payment of taxes was not made the issue in that case. Therefore the decision of the court in Rickey is not authority for the proposition as cited by Applicant.

Furthermore, Comm-Care's reliance on Rickey is misplaced, in that it ignores Section 1998A(2) as discussed above, which requires that when the taxes become due, such taxes shall be paid under protest.

**C. THE RESPONDENT CONTENDS THAT THE TRIAL COURT ERRED BY MAINTAINING DEFENDANT'S EXCEPTION OF PRESCRIPTION IN A 1998 CASE WHEN IT WAS**

**IMPOSSIBLE TO PAY THE TAXES WHEN "DUE" WITHOUT DIVESTING THE TAX COMMISSION OF ITS JURISDICTION.**

Respondent contends that Commcare is incorrect in its contention that the Tax Commission looses its jurisdiction totally if the taxes are paid if the decision is final. R.S. 47:1998 A(2) specifically requires the payment of taxes when they become due. R.S. 47:2110 provides that the taxes are paid under protest, and are held in a segregated account pending the outcome of the suit. Accordingly, the Respondents contend that the Tax Commission would not under such circumstances be divested totally of its jurisdiction, in that the taxes have not actually been paid to the taxing authorities but are being held by the Sheriff as ex-Officio tax collector, in segregated accounts, pending a determination of whether or not the taxes are in fact owed.

As discussed in the statutes above, there is a distinction between taxes being paid when "due" and "delinquent", and being "paid under protest". Respondent submits that R.S. 47:1990 would not prevent a change in an assessment if the taxes have been paid under protest, and it was ultimately concluded that the tax was illegal.

A close reading of that paragraph Section 1990 will reveal that it applies to corrections made "in order to make the assessment conform to the true and correct valuation, not to exceed its actual cash value..." Respondent submits that this section applies to "correctness" claims and not to "legality" claims.

Additionally, the Attorney General's opinion referred to by the Applicant, Opinion 77-1475 interprets 47:1990 to deprive the Tax Commission of the authority to change or correct the assessment after the taxes "have actually been paid." As discussed previously, actual payment is not made if paid under protest.

**D. APPELLATE CONTENDS THAT THE TRIAL COURT ERRED BY DENYING COMM-CARE JUDICIAL REVIEW IN ACCORDANCE WITH LA. R.S. 47:1998 THEREBY DENYING IT DUE PROCESS OF LAW.**

Applicant contends that the trial court denied it due process by denying it judicial review of its claim in the present case.

Applicant relies on a substantial number of U.S. Supreme Court cases dealing with appeals by various taxpayers throughout the United States. These cases do have one common thread, they deal with taxes which were assessed in **violation of federal law**. The

present case does not deal with such an issue at all.

Certainly any litigant is entitled to basic Due Process Clause as "that an individual be given an opportunity for hearing before he is deprived of any significant property interest." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985). However, the cases cited by Applicant in the present case do not deal with the same situations as the case at bar. There are no allegations contained in the petition for review that the taxes sought to be collected were imposed in violation of the laws of the Constitution of the United States. In fact, the Appellant is claiming a Louisiana Constitutional Exemption, pursuant to Article VII, Section 21B (1)(a).

Applicant cites McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36 (1990) for the proposition that due process under the Fifth and Fourteenth Amendments require states to provide a "clear and certain remedy" for aggrieved taxpayers to a contest tax assessments. Whereas that statement is in fact contained in McKesson, it is an incomplete citation to the quote, in that McKesson dealt with circumstances under which the state allowed tax preferences for alcoholic beverages manufactured from certain products grown in the state, and the

case involved an allegation that such taxes violated the Commerce Clause of the United States Constitution, and that it discriminated against interstate commerce.

The case of Reich v. Collins, 115 S.Ct. 547 (1994) cited by Applicant also contains similar language with regard to the "clear and certain remedy". However, Reich dealt with taxes assessed by the State of Georgia against retirement benefits paid by the Federal Government, but exempted retirement benefits paid by the state. The issue dealt with the illegally assessed taxes required to be paid by federal retirees and the discrimination against those retirees.

The Applicant further relies on Carpenter v. Shaw, 280 U.S. 363 (1930). That case dealt with an interpretation of a federal treaty between the United States and the Choctaw and Chickasaw tribes. In Shaw, the State of Oklahoma was attempting to assess ad valorem taxes which the Supreme Court ultimately determined were in contravention of an 1980 treaty.

All of these cases have the consistent thread of taxes attempted to be assessed by the various states which ultimately were determined to have been violative of either federal statutory or constitutional provisions. Such is not the situation in the case at bar, and accordingly, although the language cited

by Applicant may be accurate, it does not provide authority for this court to utilize the rulings by the Supreme Court in those respective cases.

Applicant contends that it was denied due process since it was not granted a review in the present case. However, the failure of the Applicant to obtain the review was due to its own poor judgment and erroneous decisions, not to any unconstitutional tax or violation of Federal Law.

In its original Petition, Applicant acknowledges that it filed for an exemption from taxes but that the assessors disallowed its claims. See paragraphs 8 and 9 of petition. Applicant further avers that it filed notices of appeal before the boards of review and ultimately appealed directly to the Tax Commission. See Paragraphs 10 through 12 of the original petition. Therefore, Petitioner was well aware, that its request for exemption had been denied, and was aware of the amount of the taxes owed on each of its properties.

The Applicant should have followed the procedures provided by Section 2110, and as the Fourth Circuit described in Abraham, supra., that section providing the appropriate remedy for raising the question of constitutionality of the assessment directly to District Court.

It would be have been a very simple matter for the Applicant to have paid

its taxes under protest, as it ultimately did, and to sue pursuant to Section 2110. The failure of the appellate to take such action timely is the fault of no one but itself, and no one is to blame but the Applicant. Therefore no state action has resulted in a denial of due process to the Applicant. If the Applicant did not abide by the statutory scheme provided, no one else can be blamed.

Applicant further contends that it chose to contest the 1995 assessments pursuant to what it believed to be a "clear and certain" remedy pursuant to R.S. 47:1998, and that after having complied with what it thought the requirements of 1998 to be, was told by the trial court that it was necessary to read the statute in *pari materia* with others. Appellate contends that this is a denial of due process to the Applicant. If the Applicant did not abide by the statutory scheme provided, no one else can be blamed.

Applicant further contends that it chose to contest the 1995 assessments pursuant to what it believed to be a "clear and certain" remedy pursuant to R.S. 47:1998, and that after having complied with what it thought the requirements of 1998 to be, was told by the trial court that it was necessary to read the statute in *pari materia* with others. Appellate contends that this is a denial of due process. This argument

ignores the fact that Comm-Care and its counsel had notice prior to the end of 1995 that the courts of Louisiana were in fact going to interpret Section 1998 in conjunction with Section 2110 and other portions of Title 47.

Comm-Care with it's present counsel, was a party to a proceeding before the 19th Judicial District Court, in which Judge Frank Saia rendered judgment on July 31, 1995 sustaining a peremptory exception of prescription. That case ultimately was affirmed by the Court of Appeal, First Circuit, Docket number 96-CA-0039, and which case was ultimately affirmed by the Supreme Court, on other grounds. Comm-Care v. Bishop 96-C-1711, consolidated with Comm-Care v. Louisiana Tax Commission, et al, 96-C-2455 (La. 1/21/98). Additionally, the First Circuit had previously addressed a similar issue in Capital Drilling Company v. Graves, 496 So.2d, 487 (La. App. 1st Cir. 1986). Accordingly, Applicant was on notice that the courts in Louisiana, and particularly in the First Circuit, were going to interpret sections of Title 47 together, and accordingly, the courts of this state did not change course, they merely provided more detailed analysis and reasoning for the same action previously taken by the courts.

Furthermore, Applicant reliance on Reich, supra. is ill founded in that the Supreme Court in that case did not

absolutely bar states from reconfiguring its schemes but on from "unfairly" doing so in the form of a bait and switch tactic. See Reich page 550. As discussed above, Applicant was on notice that the courts of this state were interpreting Sections 1998 and 2110 in conjunction with each other and therefore there was no unfair bait and switch change and the Applicant incorrectly tries to characterize itself as an innocent victim. In fact, as Applicant points out on page nine of the Application for Writs filed herein, Comm-Care made a choice to contest the 1995 assessments by using Section 1998, and it apparently chose to do so without complying fully with the requirements of that section, as interpreted by the Court's of this state.

Applicant continues with its argument under this assignment of error to discuss rules of statutory interpretation. For purposes of this argument, Applicant will assume that this in fact is part of the same argument on the same assignment of error. The rules of statutory construction were addressed by the Court of Appeal, First Circuit, in great detail, in Capital Drilling, supra., and counsel calls to this courts attention the detailed analysis by that Court of the rules for statutory construction. Respondent contends that the court correctly analyzed various sections of

Title 47 in that case and in the recent decision of Comm-Care Corporation v. Louisiana Tax Commission, 96-0039 (La. App. 1st Cir. 1996), and that, as argued above, Section 1998 must be interpreted in conjunction with Sections 2101 and 2110.

Applicant cites the cases of Smith v. Town of Vinton, 25 So. 2d, 237 (La. 1946) and Kaufman v. State Department of Public Safety and Driver's License Division 286 So.2d, 723 (La. App. 1st Cir. 1973) for the proposition that statutory rules of construction require the statutes be strictly construed.

Respondents agree that such is the case, and that an examination of Title 47 in its entirety, including the organization of the sections into various chapters clearly shows the legislative intent to have a predeprivation and a postdeprivation remedy. However he sections are not designed to be and cannot be read in isolation from each other, totally segregated and apart, with each statute standing on its own. Applicant's own petition argues against such interpretation, since section 1998 on its face refers to section 2110 for purposes of determining how suits under protest are to be handled. To read any of these statutes in isolation by themselves would in fact lead to absurd consequences, in that no complete remedy would be provided to any taxpayers. The

sections must be examined as a whole and read in conjunction with the entirety of the sections applicable to the same issues.

## CONCLUSION

The Trial Court and the Court of Appeals were correct in their rulings in the present case, and correctly maintained the exception of prescription filed in the case.

Section 1998 must be read in conjunction with Section 2101 and 2110. Failure to do so would lead to absurd consequences. The only "due" date established in Title 47 is in Section 2101, which provided that ad valorem taxes are due by December 31. Failure to pay the taxes when due deprives a taxpayer of the right to proceed to pay the taxes at some subsequent date under protest and later seek a refund of those taxes.

The Applicant has not been denied due process, and in fact has a history of litigation in this area and was well aware of the provisions of Louisiana Courts with regard to both Sections 1998 and 2110, and prior to December 31, 1995, was on notice that those sections were in fact being read in conjunction by the courts of this state, and accordingly, the Applicant had ample notice and opportunity to timely pay its taxes. Its failure to do so is the sole and only cause of its loss of its right

to litigate issue. It has not been denied due process by any actions of any party to this proceeding.

Respondents respectfully request that the Judgment of the Trial Court and the Appellate Courts be affirmed and that his application be dismissed at Applicant's cost.

Respectfully submitted,

/s/ Tony C. Tillman
Tony C. Tillman
Attorney for Respondents, Frank A. Howard, Lee J. Thevenot, Jewette Farley, Roy D. Miller, Gerald McCrory, Jr., Eugene Cavanaugh, Frank Granger, III, Ralph Gill, Carmon Walker, and Rich Bailey, in their respective capacities as the Assessor for their respective Parish
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**CERTIFICATE OF SERVICE**

I Tony C. Tillman, hereby certify that I forwarded a true and correct copy of the foregoing to all of the following counsel for other parties in this action: Paul West, W. Mark McKee, John F. Weeks, II, V. Russell Purvis, Leu Anne Lester Greco, David R. Lestage,

James T. Lee, Vern M. Wilts, and John A. Stasis, II, by placing same in the U.S. Mail with sufficient postage to ensure delivery on this 26th day of May, 1998.

/s/ Tony C. Tillman
Tony C. Tillman

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SUPREME COURT, U.S.

NO. 98-480

# In the Supreme Court of the United States

OCTOBER TERM, 1998

COMM-CARE CORPORATION

Petitioner,

v.

LOUISIANA TAX COMMISSION, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

## REPLY BRIEF FOR PETITIONER

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The reasons which warrant the grant of a writ are adequately stated in the petition. This reply will correct several erroneous assertions contained in the Brief in Opposition.

1. Respondents suggest that the constitutional question presented cannot be asserted in this Court because it was not raised in the original petition to the state district court. (Br. In Opp. p. 5). Generally a higher court will not consider a constitutional question unless it has been raised by the pleadings in the lower courts. But this rule does not apply in cases where the constitutional issue arises from a defendant's reliance on the subject statute to defeat a plaintiff's claim. *National Bank of Commerce in New Orleans v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College,* 20 So.2d 264, (La. 1944). "If the law were otherwise a plaintiff would be without right to attack the constitutionality of a statute merely because it did not anticipate that the defendant would in its answer rely upon the provisions (or an interpretation) thereof as a defense to the action." *Id,* at 267. In this case, it is the state district court's interpretation of the statute, not the statute itself, which Comm-Care claims is unconstitutional. The constitutional issue did not surface until the state district court dismissed the action, and it was raised in the state court of appeal and in the state supreme court.

2. Respondents assert that *Triangle Marine v. Savoie,* 681 So.2d 937 (La. 1996) holds that a taxpayer can assert a legality challenge to a state tax (as here) pursuant only to R.S. § 47:2110 and that Comm-Care therefore erroneously proceeded under R.S. § 47:1989-1998, (Br. In Opp. p. 8). *Triangle Marine* holds that a taxpayer challenging the correctness of a tax assessment *must* proceed under

R.S. § 47:1989-1998, but a taxpayer asserting a legality challenge *may* proceed under *either* of *R.S.* § 47:1989-1998 *or* 47:2110. Respondents' arguments based on this erroneous interpretation must fall.

3. Respondents assertion that a state court may require timely payment to allow post-deprivation remedies (Br. In Opp. p. 6) and their argument that Comm-Care failed to comply with the Louisiana procedure (Br. In Opp. p 9-11) beg the question presented here: Whether the courts of a state, by reading additional requirements into procedural statutes, deny due process to taxpayers who comply with the statutes' facial requirements.

## CONCLUSION

For the foregoing reasons, as well as those urged in the petition, certiorari should be granted.

Respectfully submitted,

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